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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~915~~ 22

PHILADELPHIA
BAR
ASSOCIATION

MARY WALL, WATSON WALL, SUSAN E. SHOAFF, JOHN A. SHOAFF, BYRON HUESTON BARNETT, AND JAMES WILLIAM BARNETT, APPELLANTS,

vs.

GEORGE P. BISSELL, ABRAHAM G. BARNETT, NANCY C. BARNETT, SUSAN M. BARNETT, JOHN E. HILL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED NOVEMBER 30, 1883.

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No. 217.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-rooms in the city of Fort Wayne, in said district, on the second Tuesday of December, in the year of our Lord one thousand eight hundred and eighty-two, before the Honorable Walter Q. Gresham, judge of the district court of the United States for said district and *ex officio* one of the judges of said circuit court.

GEORGE P. BISSELL
vs. } Chancery.
ABRAHAM G. BARNETT *et al.*

Be it remembered that heretofore, to wit, at the December term of said court, in recess thereof, on the 7th day of May, A. D. 1881, the following proceedings in the above-entitled cause were had, to wit:

GEORGE P. BISSELL
vs. } In Chancery.
ABRAHAM G. BARNETT *et al.*

Comes now Noble C. Butler, clerk of said court, and files herein transcript of the record and order of court transferring this cause from the docket at Indianapolis to this docket, and also the files of the court herein, to wit:

Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and
2 eighty-one, before the Honorable Walter Q. Gresham, judge of the district court of the United States for said district and *ex officio* one of the judges of said circuit court.

GEORGE P. BISSELL
vs. } Chancery.
ABRAHAM G. BARNETT *et al.*

Be it remembered that heretofore, to wit, at the November term of said court, on the 28th day of February, A. D. 1879, before the Honorable Walter Q. Gresham, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by Mess. Coombs, Morris and Bell, his solicitors, and files his bill of complaint herein in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana:

George P. Bissell, of Hartford, Connecticut, and a citizen of the State of Connecticut, brings this his bill against Abraham G. Barnett and Nancy Catharine Barnett, Susan M. Barnett, Byron Heuston Barnett, & James William Barnett, his minor children; Susan B. Shoaff and John A. Shoaff, her husband; John E. Hill, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm,

George Kamm, Charles Kamm, Harry Kamm, Anna Kamm, and Nellie Kamm, widow and children of John J. Kamm, deceased; Elizabeth Rudesill, Andrew C. Hoffmeister, Mary J. McCurdy,
3 Alfred Hattersley, Oscar Simons, & John H. Bass, who are all citizens of the State of Indiana; and Mary Ann Wall and Watson Wall, her husband, who are citizens of the State of Missouri; and Henry J. Rudisill and Elizabeth Rudisill, his wife, who are citizens of the State of California.

And thereupon your orator complains and says that on or about the 15th day of July, 1869, John H. Barnett, since deceased, & the said Abraham G. Barnett and Henry J. Rudisill applied to George P. Bissell & Co., through their agent, John Hough, of Fort Wayne, Indiana, for the loan of eight thousand dollars for the term of ten years, and it was thereupon agreed that said George P. Bissell & Co. should advance said sum and take the 8 bonds of said John H. Barnett and Abraham G. Barnett for the sum of $1,000.00 each, to be secured by a deed of trust to your orator for the lots of said John H. Barnett, hereinafter described, and that said Henry J. Rudisill should take $5,000 of the said eight thousand dollars, and as security to the said John H. Barnett and additional security for said loan should execute a mortgage on his mill on the St. Joseph's river and about thirteen acres of land adjoining thereto to secure the payment of five of said bonds, with the interest due thereon. And thereupon the said George P. Bissell & Co. advanced said sum of $8,000.00—$3,000.00 to the said John H. and Abraham G. Barnett and $5,000.00 to the said Henry J. Rudisill—and the said John H. Barnett and Abraham G. Barnett executed their eight coupon
4 bonds, bearing date of July 15, 1869, for the sum of one thousand dollars each, payable to the bearer on the 15th day of July, 1879, at the office of the said George P. Bissell & Co. in Hartford, Connecticut, with interest at the rate of nine per cent. per annum, payable semi-annually, as provided in twenty interest coupons to each of said bonds. A specimen copy of said bonds and coupons is filed herewith, marked Exhibit "A," which your orator prays may be taken as part of this his bill of complaint; and on the same day the said John H. Barnett executed his deed of trust conveying to your orator all of lot one hundred and five on the original plat of the city of Fort Wayne, except a strip ten feet wide off of the east side thereof, and also a part of lot one hundred and six on the same plat, commencing at a point on the east line of said lot thirty feet south of the northeast corner thereof; running thence south along said line 20 feet; thence west parallel with the north line of said lot to the west line thereof; thence north along said west line 20 feet; thence east to the place of beginning, in trust to secure the payment of the said eight bonds and coupons, which deed was duly recorded on the 16th day of July, 1869, in book No. 17, pages 116 to 119, in the recorder's office of said county, a copy of which deed is filed herewith, marked Exhibit B, which [your] orator prays may also be taken as part of this his bill of complaint.

5 And your orator further shows that the said Henry J. Rudisill on the same day executed and delivered to the said John

H. Barnett his bond in the penal sum of $10,000.00, conditioned for the payment of five of said bonds, with the interest thereon, as the same should become due, a copy of which bond is filed herewith, marked Exhibit "C," which your orator prays may also be taken as part of this his bill of complaint.

And afterwards, to wit, on or about the 13th day of December, 1871, the said Henry J. Rudisill applied to the said John Hough to prepare a mortgage upon his said mill and the 13 acres of land aforesaid, to be executed by him and his wife, to secure the payment of five of the said $1,000.00 bonds, according to his agreement with the said John H. Barnett and said Hough, agent as aforesaid, at the time said loan was made, he, the said Henry J. Rudisill, furnishing a description of said land, the said Henry J. Rudisill giving the following as the description of said 13 acres, including said mill, to wit, "All that portion of the fractional southeast quarter of section thirty-five (35), township thirty-one (31), range twelve (12) east, bounded on the east by the St. Joseph's river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie Canal, and on the north by the land of Julia A. Freeman, estimated
to contain thirteen acres." And thereupon the said Hough
6 caused a mortgage to be written with the description so fur-
nished by said Rudisill, conditioned to secure the payment to your orator of certain coupon bonds, bearing date July 15th, 1869, to the amount of five thousand dollars, which mortgage was duly executed by the said Henry J. Rudisill and Elizabeth Rudisill, his wife, and was duly recorded in the recorder's office of said county on the 15th day of January, 1872, in mortgage record 21, page 276, a copy of which mortgage is filed herewith, marked Exhibit "D," which your orator also prays may be taken as part of this his bill of complaint.

And your orator avers that the said Henry J. Rudisill intended the said mortgage to include his said mill, which is a flouring mill propelled by the water of the St. Joseph's river, and both he and the said Hough believing at the time that the boundaries thus given did include said mill, and that the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, when they executed said mortgage, intended it as a mortgage upon said mill, and both of them understood that the said mill was included within said boundaries.

But your orator avers that by the mistake and misrepresentation of the said Henry J. Rudisill the said mortgage so written did not clearly include all of said mill, the said Bloomingdale road, as then used and made the southern boundary of the land so mortgaged by
said Rudisill, commencing on the St. Joseph's river, running
7 up said river a short distance west of said mill, and running
thence westerly, being too far north to include all of said mill, as near as the same can be now ascertained, the said Bloomingdale road having been abandoned soon after the execution of said mortgage.

Your orator further shows that the defendant, Elizabeth Rudisill, senior, the mother of said Henry J. Rudisill, on the 10th day of October, 1861, being the owner of the said southeast fraction of section thirty-five, in township 31, range 12 east, by her deed duly executed, conveyed the same to the said Henry J. Rudisill, saving and reserving to herself "all that part lying south of a line running westerly from the mill thereon and west of the centre of the St. Joseph road," supposed to contain seven acres: that the part thus reserved by the said Elizabeth Rudisill did not include the said mill, the line running west from said mill, as established by the parties, the said Elizabeth and her son Henry J. Rudisill, and made the north boundary line of the land thus reserved, being south of said mill, as will more fully appear by reference to a diagram or plat of said premises taken from a survey made by the civil engineer of the city of Fort Wayne and herewith filed as an exhibit marked E, plat No. 1.

And your orator further shows that the said Bloomingdale road
was not a public highway, but a mere private road which was
8 intended to be located between the land so conveyed by said
Elizabeth and the land so reserved by her, but as the same
was then used it ran north of the said mill or a considerable part thereof.

And your orator further charges that the said Henry J. Rudisill and wife intended to mortgage all that part of said fraction north of the land so reserved by his mother and south of the land which had previously been conveyed to the said Julia A. Freeman, including said mill, and that the mistake in the description of said land arises from the fact that all the parties to said mortgage understood that said Bloomingdale road was on the dividing line between the lands of said Elizabeth Rudisill & the said Henry J. Rudisill, when, in fact, the said road as then used was a little to the north of said line.

And your orator further charges that the said Henry J. Rudisill has since the execution of the said mortgage to the said John H. Barnett *has* repeat*id*ly recognized the said mortgage as covering and embracing said mill; that when he sold the greater portion of said land to the said Henry Burgess and others and procured the pretended release of the land thus sold from the said Abraham G. Barnett, as hereinafter stated, he urged as a reason why the same should be so released that the mill and mill lot so reserved was ample security for the payment of said sum of $5,000.00 *dollars*
secured by said mortgage, and afterwards, when he sold the
9 undivided half of said mill to the said John E. Hill, as here-
inafter shown, he informed him that said mill was incumbered by a mortgage to said John H. Barnett for the sum of $5,000.00.

And your orator further shows that the said John H. Barnett on or about the — day of January, 1872, died testate, and by his last will and testiment devised the said lot described in said deed of trust as a part of lot 106, on the original plat of Fort Wayne, commencing 30 feet south of the southeast corner of said lot, running thence south 20 feet, then west to the west line of said lot, thence south 20 feet, thence east to the place of beginning, to the said Mary Ann Wall for life, with remainder to the defendant, Byron Heuston Barnett, remainder to the said Abraham G. Barnett and his heirs, and also devised the said lot 105 to the defendant, Susan B. Shoaff, for life, with remainder to the defendant, James W. Barnett, remainder to the said Abraham G. Barnett and his heirs, which will was duly proven before William S. Edsall, clerk of the probate court of Allen county, Indiana, and recorded in the record of wills on the 7th day of February, 1872, a copy of which is filed herewith, marked Exhibit F, which your orator prays may also be taken as part of this his bill of complaint.

And your orator further shows that the said Henry J. Rudisill on the 23d day of January, 1875, sold and conveyed all of the 10 land thus mortgaged to said John H. Barnett to the defendants, Henry Burgess, Charles A. Zollinger, and John J. Kamm, except the said mill and a small lot known as the mill lot, hereinafter more particularly described; and thereupon the said Henry J. Rudisill procured the said Abraham G. Barnett, who had been named in the will of said John H. Barnett as his executor, but who had never taken out letters, filed a bond, or in any manner qualified as such executor, to enter upon the margin of the record of the said mortgage so executed by said Rudisill and wife to said John H. Barnett a pretended release in the words following:

"I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that portion of the S. E. ¼ of section 35, t'p 31, R. 12 east, this day conveyed by Henry J. Rudisill to H. Burgess, Chas. A. Zollinger, & J. J. Kamm.

"Witness my hand and seal as such executor, Jan. 23, 1875.

"ABRAM G. BARNETT,
"*Executor of the Estate of John H. Barnett, Deceased.*

"Attest: J. M. KOCH, *Rec. A. C.*"

And your orator avers that the said Abraham G. Barnett was not at the time and never has been the executor of the said John H. Barnett, deceased, and had no power, right, or authority to execute such a release, and that such pretended release is null and void.

And your orator further shows that the said Henry Burgess, Charles A. Zollinger, and John J. Kamm, on or about the 11 2d day of February, 1875, caused the greater part of the said land so deeded to them by the said Henry J. Rudisill & wife to be surveyed into lots, streets, and alleys, and a plat thereof recorded in the recorder's office of said county of Allen as Burgess, Zollinger, and Kamm's addition to the city of Fort Wayne.

And your orator further shows that the deed from the said Henry J. Rudisill to said Burgess and others covers and embraces all of the land mortgaged to said John H. Barnett except the said mill and the land on the east side of St. Joseph road and a lot on the northeast corner of said plat, marked "hill" on said plat, as shown by diagram No. 2 on Exhibit E.

And your orator further shows that the street called Burgess avenue on said diagram No. 2 is laid out on the north line of the lot so reserved by the said Elizabeth Rudisill, where the said Bloomingdale road was intended to be located, and is located south of said mill; that the plat of said addition covers other lands than said morgaged premises, but where the dividing line is is unknown to your orator, and can only be ascertained by an accurate survey of said mortgaged premises.

Your orator further shows that the said Charles A. Zollinger has conveyed lots 1, 2, 3, 4, 5, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, & 31 in said addition to the said Henry Burgess, and has
also conveyed No. 6 to the defendant, Andrew C. Hoffmeister,
12 and lot No. 17 to the said Mary J. McCurdy; and on the 9th
day of March the said Charles A. Zollinger conveyed lots 7,
8, 9, 10, and 11 and the undivided half of lots 32, 33, 34, 35, 36, and 37 to the said Oscar Simons and John H. Bass, together with a part of said mortgaged premises on the west end thereof, not embraced in said Burgess, Zollinger, & Kamm's addition.

And your orator further shows that the said John J. Kamm died intestate on or about the — day of ——, 187–, leaving the said Hannah Kamm, his widow, and the said Andrew Kamm, George Kamm, Harry Kamm, Anna Kamm, and Nellie Kamm, his children and only heirs-at-law.

And your orator further shows that the said Henry J. Rudisill, on the 24th day of November, conveyed an undivided half of said mill and mill lot to the said defendant, John E. Hill, subject to said mortgage for $5,000.00 to said John H. Barnett, and that said Alfred Hattersley claims to have some interest in said mortgaged premises, but that all the interest of said Burgess, Zollinger, the heirs of J. J. Kamm, deceased, the said Hoffmeister, McCurdy, Hattersley, Simons, and Bass in and to said mortgaged premises is inferior and subject to the said mortgage to the said John H. Barnett.

And your orator further shows that by the terms and conditions
of the eight bonds of one thousand dollars each so execued by
13 the said Abraham G. Barnett and John H. Barnett, and the
said trust deed to secure the payment thereof, it was expressly
agreed that if default should be made in the payment of any of the interest on the principal sum of $1,000, in each of said bonds mentioned, and the same should remain due and unpaid for thirty days after such interest should become due, then and in that case the principal sum in each of said bonds mentioned, with all the arrearages of interest, should, at the option of the legal holder of said bonds or either of them, *should* thereupon become due and might be collected immediately thereafter.

And your orator avers that one interest coupon, numbered 19, to each of said bonds, for the sum of $45.00 each, making $360.00, became due and payable on the 15th day of January, 1879, and more than thirty days have elapsed since the same became due and payable, and said defendants have wholly failed and neglected, and still do fail & neglect, to pay the same or any part thereof.

And your orator avers that the holders of said bonds have exercised the option conferred upon them by the terms of said bonds and declared that the whole of said principal sum and the interest accrued thereon has become due and collect*a*ble, and there is now due and payable to your orator, as such trustee, the sum of $360.00,

as stipulated in interest coupons numbered 19, with 6
14 per cent. interest thereon from the 15th day of January,
1879, and the further principal sum of $8,000.00, with nine per cent. interest thereon from the said 15th day of January, 1879, together with one-fifth of one per cent. on the whole sum for exchange, and the further sum of $375.00 for his solicitors' fees, which he avers is a reasonable sum therefor.

And your orator further shows that the said bond and mortgage so given by the said Henry J. Rudisill has been assigned to him as additional security for said debt; and he further shows that the said Henry J. Rudisill, after the payment or several installments of interest on said sum of $5,000.00, has abandoned said property and left the country and removed to the State of California, since which time the said Abraham G. Barnett has paid all the interest on said debt, except said coupons numbered 19, but the precise sum paid by each is unknown to your orator.

To the end, therefore, that the said defendants may upon their several & respective corporal oaths full, true, direct, & perfect answers make to all the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated and they and each of them thereunto distinctly interrogated, and that
the said Henry Burgess and Charles A. Zollinger may an-
15 swer and set forth specifically what part of the said plat of
the said Burgess, Zollinger and Kamm's addition covers, the land so mortgaged by said Henry J. Rudisill, or is included within the descriptions of the land in said mortgage, giving the numbers of each lot or part of lot included within such description, and that an account may be taken by and under the decree and direction of of this honorable court of what is due and owing to your orator for principal and interest on the said bonds and mortgage of the said John H. and Abraham G. Barnett.

And that an account may also be taken in like manner of what part of said debt and interest is due to your orator from the said Henry J. Rudisill upon his said bond and mortgage, and also what, if anything, is due from the said Henry J. Rudisill to the said Abraham G. Barnett for interest on said bonds paid by him for the said Rudisill, and that the said defendants may be decreed to pay to your orator what may be found due to him on taking such account, together with costs of suit, by as short day to be appointed for that purpose —, or that in default thereof the said defendants and each and every one of them may be absolutely debarred and foreclosed of and from all right, claim, lien, and equity of redemption to, upon, or in
the premises so mortgaged to your orator by the said John
16 H. Barnett, deceased.

And your orator further charges that the said mortgage so executed by the said Henry J. Rudisill to the said John H. Barnett, deceased, may be re-formed, as to include said mill and all the land north of said Burgess avenue, according to the intent and meaning of all the parties to the said mortgage, and that the said last-mentioned mortgage may also be foreclosed, and that said mortgaged premises may be decreed to be sold according to law and the rules

and practice of this honorable court, without appraisement, in the following order, to wit: That the undivided half of said mill and the lands between the said St. Joseph road and the river covered by the said Rudisill mortgage to said Barnett, and the lot known as the mill lot and marked "Hill" on the plat of said Burgess, Zollinger, and Kamm's addition be first offered for sale to make the amount so found due from the said Henry J. Rudisill, and if the same fails to sell for enough to pay the same then the whole be offered, and if the whole fails to sell for enough then so much of that part of said land as was sold to said Burgess, Zollinger, & Kamm as may be necessary to make the residue of said sum be in like manner sold, and that the said lot 105 and part of lot 106 on the original plat of the city of Fort Wayne, or so much thereof as may be necessary, be sold to make the residue of the sum found due to your orator, together with the costs of this suit, and that your orator may
17
have such other and further relief in the premises as shall be agreeable to equity and good conscience.

And may it please your honors to grant unto your orator the writ of subpœna, to be directed to the said defendants, Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, Byron Heuston Barnett, and James William Barnett, minor children of the said Abraham G. Barnett; Susan B. Shoaff, John A. Shoaff, John E. Hill, Junior, Henry Burgess, Charles A. Zollinger, Hannah Kamm, & Andrew Kamm, an infant; Charles Kamm, an infant; Harry Kamm, an infant; Anna Kamm, an infant, and Nellie Kamm, an infant; Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar Simons, John H. Bass, Mary Ann Wall, Watson Wall, Henry J. Rudisill, and Elizabeth Rudisill, therein and thereby commanding them and each of them, on a certain day therein to be named, personally to be & appear before your honors in this honorable court to answer all and singular the premises, and to stand to, abide by, and perform such orders and decree therein as to your honors shall seem meet.

And your orator will ever pray.

COOMBS, MORRIS & BELL,
Solicitors for Compl't.

We acknowledge ourselves security for costs in this action.
Feb'y 27, 1879.

COOMBS, MORRIS & BELL.

18 EXHIBIT "A."

No. —. *Nine-Per-Cent. First-Mortgage Coupon Bonds* $1,000.

(Revenue stamp on trust deed.)

UNITED STATES OF AMERICA,
State of Indiana, County of Allen, City of Fort Wayne:

Know all men by these presents that we, John H. Barnett and Abraham G. Barnett, of the city of Fort Wayne, county of Allen, and State of Indiana, do hereby acknowledge ourselves indebted to George P. Bissell & Co., or bearer, in the sum of one thousand dol-

lars, lawful money of the United States of America, and we do hereby promise and bind ourselves, our heirs, executors, and administrators, firmly by these presents to pay the same to the bearer at the office of George P. Bissell & Co., in the city of Hartford and State of Connecticut, on the fifteenth day of July, in the year of our Lord eighteen hundred and seventy-nine, on the presentation and surrender of this obligation, with the privilege of paying the same at any time after five years from the date hereof, with interest for the same, to be computed from the date hereof, at the rate of nine per cent. per annum, which said interest shall be paid half yearly, to wit, on the fifteenth day of the months of January and July in each and every year until the said principal sum shall be fully paid. The said payment shall be made at the office of the said George P. Bissell & Co. on the surrender of the annexed coupons representing such interest, said bond and coupon payable without relief from
19 the valuation or appraisement laws of the State of Indiana.

It is also expressly agreed and fully understood that if default be made in the payment of any of the interest on the principal sum above mentioned, and any portion thereof (or any portion of the interest on any one of the series of bonds of which this is one), shall remain due and unpaid for the space of thirty days after maturity, according to the above conditions, then, and in that case, the principal sum above mentioned, together with all arrearages of interest thereon, shall, at the option of the legal holder of this bond, thereupon become due and payable, and may be demanded and collected immediately thereafter. It is hereby expressly declared that this bond is made under and in all respects to be construed by the laws of the State of Indiana, and is one of a series of bonds of like tenor and effect with this obligation, and eight in number, amounting in the aggregate to eight thousand dollars, and are given for an actual loan of money made at Fort Wayne by said George P. Bissell & Co. to the said John H. Barnett and Abraham G. Barnett on the day of the date hereof, and are collaterally secured by a deed of trust duly stamped and recorded in the office of the recorder of Allen county aforesaid, executed by the said John H. Barnett to George P. Bissell, and conveying property situated in the city of Fort Wayne, estimated at not less than sixteen thousand dollars; also by policies of insurance to the extent of three thousand dollars.

20 In witness whereof we have hereunto set our hands and seals, and to the coupons hereof, at the city of Fort Wayne aforesaid, on this fifteenth day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

——— ———.
——— ———.

Coupon No. 20.

We, John H. Barnett and Abraham G. Barnett, will pay to the bearer, at the office of George P. Bissell & Co., in the city of Hartford, on the fifteenth day of July, 1879, forty-four dollars without relief from valuation and appraisement laws, being six months' interest due at that date upon one bond.

——— ———.

No. —. ——— ———.

Coupon No. 19.

We, John H. Barnett and Abraham G. Barnett, will pay to the bearer, at the office of George P. Bissell & Co., in the city of Hartford, on the fifteenth day of January, 1879, forty-five dollars without relief from valuation and appraisement laws, being six months' interest due at that date upon one bond.

——— ———.

No. —. ——— ———.

EXHIBIT "B."

This indenture, made this 15th day of July, in the year eighteen hundred and sixty-nine, between John H. Barnett and Abraham G. Barnett, of Allen county and State of Indiana, of the first part, and George P. Bissell, of the city of Hartford and State of Connecticut, of the second part, witnesseth:

That whereas the said John H. Barnett and Abraham G. Barnett have borrowed the sum of eight thousand dollars, and for
21 which they have executed their eight coupon bonds, bearing
even date herewith, each for the principal sum of one thousand dollars, payable to the bearer at the office of George P. Bissell & Co., bankers, in the city of Hartford and State of Connecticut, and numbered from one to eight, inclusive, payable ten years after the date thereof, with the privilege of payment after five years, and with interest thereon, payable semi-annually at nine per cent. per annum; for which interest certain coupons, each for the sum of forty-five dollars, bearing even date with said bonds and numbered from one to twenty, inclusive, have been executed by the said John H. Barnett and Abraham G. Barnett, payable to the bearer, at the office of said George P. Bissell & Co., in said city of Hartford.

And whereas it is agreed in and by said bonds that if default shall be made in the payment of any of the coupons thereof, and the same shall remain due and unpaid for thirty days after the same shall become due and payable as aforesaid, or in case the said John H. Barnett and Abraham G. Barnett, or their executors, administrators, or assigns, shall at any time hereafter until said principal sum and all arrearages of interest thereon shall be fully paid, suffer the premises hereinafter mentioned, or any part thereof, to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, in, or upon or about said premises or any part thereof anything that may in anywise weaken or diminish the security intended under and by virtue of this instrument, or shall fail,
22 neglect, or refuse to keep up policies of insurance upon the
property hereinafter mentioned, or shall fail, neglect, or refuse to perform and fulfill any of the covenants, stipulations, or agreements herein contained according to the tenor and effect, time, interest, and meaning thereof, then the said principal sum and all

arrearages of interest shall, at the option of the owner or owners of said bonds or any one thereof, *shall* become due and payable and may be immediately collected at any time after such default.

And whereas it is further agreed that in case the holder or holders of any of said bonds resort to legal proceedings for the collection thereof after the same shall become due and payable as aforesaid, he or they shall recover, in addition to the principal, interest, and ordinary costs, reasonable attorney's fees for the collection thereof, the amount to be determined by the court.

Now, therefore, the said John H. Barnett, of the party of the first part, in consideration of the premises and for the purpose of securing the payment of said several bonds, as well as said several coupons, and for the performance of all the covenants, stipulations, and agreements herein contained, and in and for the consideration of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has and does hereby grant, bargain, sell, and convey unto the said party of the second
23 part, his successor or successors to the trust hereinafter named,
the following-described premises in the city of Fort Wayne, county of Allen, and State of Indiana, and all the right, title, and interest which the said John H. Barnett has in and to the same and every part thereof, to wit: All of lot one hundred and five (105) on the original plat of the town of Fort Wayne except a strip off the east side of said lot ten feet in width, running from front to rear thereof, and part of lot one hundred and six (106) on the same plat, commencing at a point on the east line of said lot, thirty (30) feet south of the northeast corner thereof, thence running south along said line twenty feet, thence west at right angles therewith to the west line of said lot, thence north along said west line twenty (20) feet, thence east at right angles therewith to the place of beginning:

To have and to hold the premises aforesaid, with all and singular the appurtenances thereunto belonging, unto the said party of the second part, his successor or successors, in trust, nevertheless, that in case of default in the payment of said bonds or coupons, or either of them, or any part thereof, or in case of any breach of any of the covenants or stipulations herein contained, then, on application of the legal holders of said bonds or of said coupons, or any or either of them, it shall and may be lawful for said party of the second part, his successor or successors in the trust herein,
24 and he or they are hereby authorized, personally or by agent
or attorney, to enter into or upon all and singular the premises hereby granted or intended so to be, or any part thereof, and to have and to retain possession thereof and to receive all rents, issues, and profits thereof and to sell and despose of said premises or any part thereof or any interest therein and all the right, title, benefit, and equity of redemption of said John H. Barnett, the party of the first part, his heirs and assigns, at public auction, at the court-house door, in the city of Fort Wayne, county of Allen, and State of Indiana, for the highest and best price the same will bring in cash, at least sixty days' public notice having been pre-

viously given of the time and place of such sale by advertisement in one of the newspapers at that time published in said city of Fort Wayne, and to adjourn said sale from time to time, as may be thought expedient, and to make, execute and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance for the premises, sold, and out of the proceeds or avails of such sale and the purchase-money paid thereon, after first paying all costs of advertising, sale, commissions, and all other expenses of this trust, including all moneys advanced for taxes and other liens and assessments on said premises, with interest thereon, then to pay said bonds and coupons and any additional interest that may have accrued thereon to the legal holder or 25 holders thereof, rendering the surplus, if any, to said party of the first part or to such other person or persons as may be lawfully entitled thereto on reasonable request.

And, further, when the indebtedness secured hereby shall be fully paid, then the said party of the second part, or his successors in said trust, shall release, satisfy, or quit-claim to the said party of the first part, or to such person or persons entitled thereto, the title hereby conveyed at the expense of the said party of the first part.

And the said grantor, for himself, his heirs, executors, administrators, or assigns, hereby covenants to and with the said George P. Bissell, his successor or successors, that he will at all proper times pay and discharge all taxes or other assessments upon said premises, or any part thereof, and will not suffer or permit said premises, or any part or parcel thereof, to be sold for any tax or assessment whatever; and said grantor further agrees to make no deduction from the amount assessed for taxable purposes on the property herein conveyed on account of the lien created by the within deed, until said principal sum and all arrearages thereon are fully paid. And further, that he will at all times hereafter, until said principal sum and all arrearages of interest are fully paid, keep all the 26 buildings (out-houses excepted) now situate upon, or that may hereafter be erected upon, said premises insured against loss or damage by fire in some good and responsible insurance company or companies (the selection of such insurance company or companies to be left at the option of said party of the second part or his successor), and will legally and properly assign to the said party of the second part, or his successor, and deliver to said trustee or to John Hough, his authorized agent, each, all, and every the policies of insurance therefor as soon as and whenever such insurance shall be effected, and will also deliver to said trustee or to John Hough, said authorized agent, all premium or renewal certificates received for the payment of the premiums upon such policy or policies of insurance as soon and whenever such certificates shall be issued, and upon default of so doing the party of the second part or his successor may effect such insurance in his or their names, or otherwise, and the premium money paid therefor shall be a charge upon said premises and secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said party of the

first part, or his proper representatives, to the said party of the second part, or his successors in said trust, on demand, and may be collected at any and all times after the same shall have been paid, with
27 *with* interest thereon at the rate of nine per cent. per annum from the time the same shall be advanced; and the said party of the second part, and his successors, shall hold each and all of such policies of insurance so received, by assignment or otherwise, as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all moneys that may at any time become collect*a*ble or receivable upon each, all, and every of such policies of insurance and apply the same when received in the same manner, so far as possible, as is herein provided for in case of a sale of said above-described premises under the power of sale herein contained, but nothing herein contained shall be construed as requiring the said party of the second part, or his successors, to incur any expense or make any effort to collect any money that may be due on any of such policies of insurance, but if said trustee shall elect not to collect the same, he shall make such election within a reasonable time after such money shall become collect*a*ble, and on demand of said party of the first part or his legal representatives.

And it is further stipulated and agreed between the parties aforesaid that the said policy or policies of insurance shall never be less in the aggregate than $3,000.00.

And it is further agreed between the parties aforesaid that
28 in case the said party of the first part, or his legal representatives, shall at any time fail to pay any tax or assessment upon said premises, or any part thereof, or shall suffer or permit said premises, or any part thereof, to be sold for any such tax or assessment, said trustee may pay at his option such tax or assessment or decline such sale, and the money so paid shall be a charge upon said premises and secured by this instrument, and shall be paid and collect*a*ble, with nine per cent. interest thereon, in the same manner as is above provided in the case of premiums of insurance paid by said party of the second part.

And it is further stipulated and agreed between the parties that this instrument shall in all respects be governed by the laws of the State of Indiana now in force.

And, further, that in case of the death or resignation of the said George P. Bissel, or his inability to act as such trustee, it is hereby agreed that the proper court may appoint as his successor in said trust Edward H. Perkins, of Hartford, in the State of Connecticut, or in case of the inability of said Perkins, then to appoint such person as may then be the president of the Hartford National Bank.

In witness whereof the said John H. Barnett has hereunto affixed his hand and seal, at Fort Wayne, this 15th day of July, eighteen hundred & sixty nine.

(Signed) J. H. BARNETT.

STATE OF INDIANA, }
County of Allen, } *ss:*

29 Personally appeared before me, the subscriber, a notary public in and for said county, J. H. Barnett, the grantor in the above conveyance, and acknowledged the same to be his voluntary act and deed for the uses & purposes therein mentioned, the [said] Barnett being a batchelor.

Witness my hand and notarial seal this fifteenth day of July, A. D. 1869.

(Signed) D. C. FISHER,
Notary Public.

Rec'd for record July 16th, 1869, at 10 a. m., & recorded in book No. 17, page- 116, 117, 118, & 119.

(Signed) C. A. REKERS,
Rec. A. C.

EXHIBIT "C."

Know all men by these presents that I, Henry J. Rudisill, am held and firmly bound unto John H. Barnett in the penal sum of ten thousand dollars; which payment, well & truly to be made, I hereby bind myself, my heirs, and assigns, firmly by these presents, without relief from valuation or appraisement laws.

Witness my hand and seal this 15th day of July, 1869.

The condition of the above obligation is such that whereas the said Henry J. Rudisill has received from said Barnett the sum of five thousand dollars, part of a loan made by J. H. Barnett and Abraham G. Barnett, for the sum of eight thousand dollars, of 30 George P. Bissell, of Hartford, in the State of Connecticut, secured by the eight several bonds of $1,000.00 each of said Abraham G. & John H. Barnett, bearing date the 15th of July, 1869, with nine per cent. interest, said bonds secured by trust deed to said Geo. P. Bissell, executed by said John H. Barnett, and recorded July 16th, 1869, in book 17, pages 116 to 119, of the records of said Allen county, State of Indiana, which said sum of five thousand dollars said Rudisill has assumed to pay according to the terms of said bonds, with the interest thereon at the rate of nine per cent. from the said 15th day of July: Now, if the said Rudisill shall well & truly pay said sum of ($5,000.00) five thousand dollars of said bonds, with the interest thereon as it becomes due, according to their terms, tenor, & effect, then this obligation to be void; otherwise to remain in full force & virtue in law.

Witness my hand & seal this 15th day of July, 1869.

HENRY J. RUDISILL. [SEAL.]

EXHIBIT "D."

This indenture witnesseth: That we, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, of Allen county, in the State of Indiana, mortgage and warrant to John H. Barnett, of Allen county, in the State of Indiana, for the sum of five thousand dollars ($5,000) the

Exhibit E."

Diagram No 1

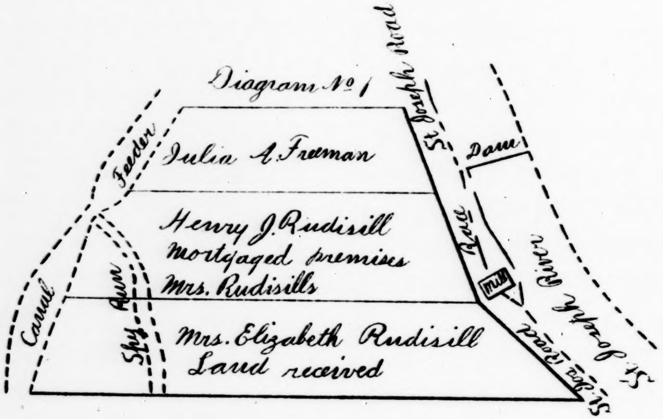
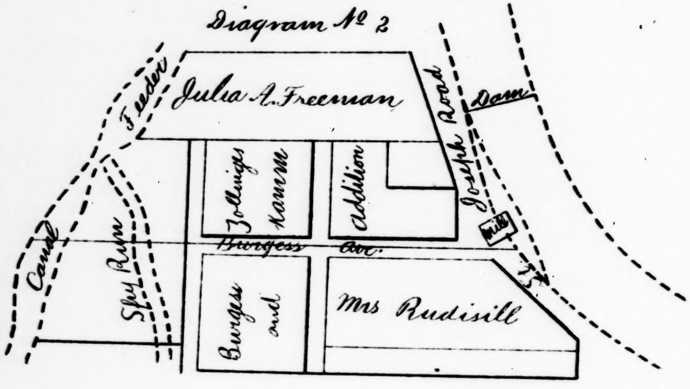


Diagram No 2



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Wall et al.
v.
Bissell et al. } p. 32.

following real estate situate in Allen county and State of Indiana and described as follows, to wit: All that portion of the fractional southeast quarter of section thirty-five (35), township thirty-
31 one (31), range twelve (12) east; bounded on the east by the St. Joseph river, south by the Bloomingdale road, west by the feeder to the Wabash & Erie canal, and on the north by the lands of Julia A. Freeman, estimated to contain thirteen (13) acres; to secure the payment of the following-described bond, to wit, a bond of even date herewith to secure the payment to George P. Bissell of certain coupon bonds bearing date July 15th, 1869, to the amount of five thousand dollars, as fully recited in said bonds given by said mortgagor to the said mortgagee. And the mortgagor expressly agrees to pay the sum of money above secured without any relief from valuation or appraisement laws; and if any part of the debt or interest secured by this mortgage is not paid when due said mortgagor further agrees to pay to said mortgagee all attorneys' fees and other costs and charges for the collection thereof, payable and collectable in manner aforesaid for value received.

In witness whereof the mortgagors have hereto set their hands and seals this 13th day of December, A. D. 1871.

(Signed) HENRY J. RUDISILL.
" ELIZABETH E. RUDISILL.

STATE OF INDIANA, }
Allen County, } *ss:*

Before me, a notary public in and for said county, this thirteenth day of December, 1869, personally appeared Henry J. Rudisill and Elizabeth E. Rudisill and acknowledged the execution of the above mortgage.

Witness my hand and notarial seal this thirteenth day of December, A. D. 1871.

(Signed) D. C. FISHER,
Notary Public.

(Here follows diagram marked p. 32.)

33 EXHIBIT "F."

Page 1. With profound regard for the goodness of God & for his bounty to me, I, John H. Barnett, eldest son of James Barnett, dec'd, late of Allen county, Ind., do make & publish this as my last will & testament, having fully considered of the subject-matters hereof & this when written and duly executed let no man gainsay.

First. I devise unto my elder sister, Mary Ann Wall, the lot on Calhoun street, Fort Wayne, Ind., twenty feet front & sixty feet deep, including my rights in the private alley to the west end of said lot, the same being a part of lot No. one hundred and six (106), old plat, on the southwest cor. of Calhoun & Berry streets, lying south & adjoining the thirty-feet lot on the said corner owned by Elizabeth Barnett, wife of my brother, A. G. Barnett, to have & to hold the same subject to the payment of all taxes & special assessments for improvements, &c., as other city property is taxed & assessed, for &

during her natural life—the remainder to Byron Huston Barnett, eldest son of my brother, A. G. Barnett & Elizabeth, his wife, if living at the death of my said sister, Mary Ann Wall; if not living at the said death of Mary Ann, then to his, said Byron Huston's, living children; & if he shall leave no such living children, then this remainder of the devise shall go to my brother, Abram G. Barnett, and his heirs—that is, to him, if living, or, if dead, to his heirs the same as if it had been willed direct to him and his heirs.

34 Second. I devise unto my sister, Susan Barnett Shoaff, a life estate only in lot one hundred & five, old plat, in the city of Fort Wayne, Ind., situated on Berry St., & occupied now by De Groff Nelson, to have & to hold the said lot so situated for her lifetime aforesaid, subject to the payment of taxes and assessments, as stated in the first clause of this will; at her death remainder to James William Barnett, the second son of my brother, A. G. Barnett, & his wife, Elizabeth, if he shall be living then: if dead, then to his child or children in lawful wedlock, if any living, & if none living, then to my brother, A. G. Barnett, and his heirs—that is, to him if living, but if dead then to his heirs, as if it had been willed direct to him & his heirs.

This the second devise, viz., that to Mrs. Susan Shoaff, my sister, shall have this authority attached to it, viz., should it be deemed expedient in a business point of view to sell said lot in order to extend the buildings east of it fronting on Calhoun street to the west over said lot so devised to said Susan Shoaff, then she shall represent the same to the court having probate jurisdiction in Allen County, Ind., on ordinary legal notice being given to the parties in interest, & in its discretion the said court may order the same sold at its appraised value, as lands are appraised & sold on execution according to the laws of Indiana, said sale to be by a trustee appointed by said court at said time, & the proceeds of said sale
35 invested in productive real estate, or invested by said trustee in stocks or security loaned by said trustee, subject to the order & control of said court in order to preserve the integrity of the trust in the spirit of this devise: the proceeds of such investment—that is, the rents & profits of the lands so purchased by said trust fund & the interests & profits arising out of said contemplated investments in stocks or loans—to be paid at stated & reasonable periods to said Susan Barnett Shoaff, my sister, & such trust lands so purchased by the said trustee in his name for the uses named in this will & the stocks & securities so named shall at said Susan's death follow in the same manner as the lot now devised in this the second clause of this will is to descend & pass on the contingencies therein named happening.

Third. I further devise unto my said sister, Susan Barnett Shoaff, a life interest in & to so much of the homestead place on which I live & which I own, being a part of lot one, Wells' pre-emption in Washington township, Allen Co., Ind. So much I name of said place as shall be found to be included between the south line of the land now owned, or rather on which Ira Lewis lives (& which he bought of said Susan Barnett Shoaff before her marriage), and a line drawn

from the front of said homestead place or Spy Run avenue from a
point on said front one-third of the distance from the north-
36 west corner to the southwest corner, said line to run parallel to
said south line of said tract on which said Lewis lives to the
Saint Joseph river, the remainder at her death to descend to her living
child or children; but if she have none then at her death living,
then said tract of land to go to my brother, Abram G. Barnett, & his
heirs—that is, to him if living, but if he be dead then to his heirs,
as named with regard to the lands devised in the second clause of
this will.

Fourth. The balance of my homestead place on Spy Run avenue,
Wells' pre-emption, not devised I now devise to my brother, Abram
G. Barnett, & his now living children, viz., Catharine, Susan, Byron
Huston, and James William, as tenants in common, my brother, A.
G. Barnett, to control the respective interests of said children, Cath-
arine, Susan, Byron Huston, & James William Barnett, in this de-
vise, & only to sell the same as the property of other infants are sold,
by guardian, on order of the court having such jurisdiction & on bond
duly executed to protect the said interests of his wards. This, however,
is not to prevent any other judicious person from taking said trust,
if expedient or necessary, on the conditions named. This clause is
intended to cover all the balance of my real estate, but if there shall
b*y* any not named then it shall be a residu-m, & shall go to my
brother, Abram G. Barnett, & his children named as above, just in
the same manner & on same terms as are hereinbefore named in
this clause.

37 Fifth. Now, as to my interest in the paper mill & business
carried on at the city of Fort Wayne under the name of Free-
man & Barnett, which is regarded as one-third in extent of said
business effects, real & personal, &c., &c., stock, assets, machinery,
dividends, dues, &c., I devise & bequeath, subject to the conditions
& agreements, performed or unperformed, which were named at the
time I became a party in interest in said paper business so carried
on by & in Freeman & Barnett's name, & which conditions and agree-
ments are known to my brother, A. G. Barnett. I give & bequeath
unto my said brother, A. G. Barnett, & to my nephews, James Bar-
nett Wall & Charles W. Wall, sons of my sister, Mary A. Wall, all
my interest in the paper mill & business aforesaid, real & personal,
or otherwise, so carried on & owned by said Freeman & Barnett:
To have & to hold to each of said devisees or legatees, three in num-
ber, so named one full third of my said interest in said paper busi-
ness, mill, &c. The sole control of the respective interests of said
James B. & Charles W. Wall shall be under the control of my
brother, A. G. Barnett, until said James B. shall reach the age of
twenty-five years. The profits arising out of said interest so be-
queath- to said Charles & James B. respectively shall be, at reason-
able periods, each year paid said legatees respectively by said Bar-
nett, or by any other person who may be authorized to control said
interest in the progress of said business by law or otherwise.

38 And I hereby give the said A. G. Barnett the right to sell
said interests of said Chas. & James B., if he shall deem such

sale expedient & for the best interests of said Chas. & James, he, the said A. G. Barnett, first giving said Chas. & James security for faithfully accounting to them for the proceeds of said sale, or if he shall desire to buy said interest, or either of them, before either shall be of age, then some third party shall qualify as guardian & proceed to sell the same to said A. G. Barnett under order & authority of law.

Sixth. I name my brother, A. G. Barnett, my executor, to act himself, or jointly with one he may cho-se; if acting alone, then he shall & may do so without bond as such executor, but if acting with another both shall give bond & take out letters testamentary & proceed according to law; but if he shall act alone, then, as executor, he shall have authority under this will to proceed as if he had letters testamentary to execute the trusts devolved on him as executor, as also those which may incidentally arise in the execution of this trust as executor, but not any others arising out of a different relation, such as trustee or guardian of some of the parties named herein or if some of the trust funds named hereinbefore. He shall have power to proceed to collect all debts, judgments, or choses in action due me at my death, all rents due me at my death, of any & all my real estate, except the homestead, & to have control
39 of & dispose of all my personal property, moneys, & effects, reducing them to availibility, & to collect all rents on the lots devised respectively, located in the city of Fort Wayne, until such rents & the reasonable use of the whole homestead place, including that devised to Mrs. Susan Shoaff & to himself, until such funds, so arising from rents, use of homestead, moneys, personal property, &c., shall be enough to pay my debts, funeral expenses, debts of last illness, & to purchase a lot in Lindenwood cemetery, properly & fairly improve it, pay for exhuming the remains of my father & mother, their interment, and the erection of a monument suitable to their condition in life in said lot, and this shall be done speedily as the nature of the business shall allow, after which the devisees respectively herein lastly named, & incidentally referred to, shall control said property as the same is intended in the respective clauses wherein said property is devised.

I now have read the foregoing twice, being the same that I dictated, and being still satisfied with it, I now, in the presence of John W. Dawson & Amanda M. Dawson, his wife, declare the same to be my last will & testament.

Nov. 1st, 1871.

J. H. BARNETT.

We certify that the foregoing will and testament of John H. Barnett was signed by him in our presence, & we have witnessed it in his presence, & in the presence of each other, and that he
40 declared the same to be his last will & testament, and we further certify that said testator was, at the said signing, in sound mind & fully able & competent to make said will, & declared himself fully satisfied with it.

Witness the same this first day of November, A. D. eighteen hundred and seventy-one.

JOHN W. DAWSON.
A. M. DAWSON.

STATE OF INDIANA, } ss:
Allen County, }

Personally appeared before me, Wm. S. Edsall, clerk of the court of common pleas of Allen county, State aforesaid, Amanda M. Dawson, who, being by me duly sworn, on her oath says that the within-named testator, at the time of executing the within and foregoing will and testament, was of full age to devise real estate and of sound mind, memory, and understanding, and not under coercion or restraint, and that said will was duly executed by said testator, and by him declared to be his last will and testament in her presence, and that she saw the said testator affix his signature to his said will, and that she signed the said will as witness thereto, at the request of said testator, in his presence and in the presence of John W. Dawson, the other subscribing witness.

A. M. DAWSON.

Subscribed and sworn to before me, as witness my hand and seal of said court, this 7th day of Feb., A. D. 1872.

[SEAL.]
WM. S. EDSALL,
Clerk Court Common Pleas of Allen Co.

STATE OF INDIANA, } ss:
Allen County, }

41 I, W. S. Edsall, clerk of the court of common pleas of Allen county, State aforesaid, do hereby certify that the foregoing and annexed last will and testament of John Huston Barnett, late of Allen county, deceased, has been duly admitted to probate, and its due execution was this day proven by John W. Dawson & Amanda M. Dawson, whose proof, together with such will, has been duly recorded on pages 214 and — of the record of wills, No. 3, remaining in our office.

In testimony whereof I have hereunto set my hand and seal of said court this 7 day of Feb'y, A. D. 1872.

[SEAL.]
WM. S. EDSALL,
Clerk C. C. P., A. Co., Ind.

STATE OF INDIANA, } ss:
Allen County, }

Personally appeared before me, Wm. S. Edsall, clerk of the court of common pleas of Allen county, State aforesaid, John W. Dawson, who, being by me duly sworn, on his oath says that the within-named testator, at the time of executing the within and foregoing will and testament, was of full age to devise real estate and of sound mind, memory, and understanding, and not under coercion or restraint, and that said will was duly executed by said testator, and by him declared to be his last will and testament in his presence, and that he saw the said testator affix his signature to his said will, and that he signed the said will as witness thereto, at the request of said testator, in his presence and in the presence of Amanda M. Dawson, the other subscribing witness.

42 JOHN W. DAWSON.

Subscribed and sworn to before me, as witness my hand and seal of said court, this 7 day of Feb'y, A. D. 1872.

[SEAL.] WM. S. EDSALL,
Clerk Court Common Pleas of Allen Co.

STATE OF INDIANA, }
Allen County, } *ss:*

I, W. S. Edsall, clerk of the court of common pleas of Allencounty, State aforesaid, do hereby certify that the foregoing and annexed last will and testament of John Huston Barnett, late of Allen county, deceased, has been duly admitted to probate, and its due execution was this day proven by John W. Dawson & Amanda M. Dawson, whose proof, together with such will, has been duly recorded on page 214 and — of the record of wills, No. 3, remaining in our office.

In testimony whereof I have hereunto set my hand and seal of said court this 7 day of Feb'y, A. D. 1872.

[SEAL.] WM. S. EDSALL,
Clerk C. C. P., A. Co., Ind.

STATE OF INDIANA, }
Allen County, } *ss:*

I, Wm. S. Edsall, clerk of the court of common pleas of Allen county, State aforesaid, do hereby certify that the annexed and foregoing is a full, true, perfect, and complete copy of the last will and testament of John Huston Barnett, late of Allen county, Indiana, deceased, together with the affidavit of proof and certificate of probate thereon endorsed, as the same remain on file and of record in my office.

In testimony whereof I have hereunto set my hand and seal of said court this 8th day of February, A. D. 1872.

[SEAL.] WM. S. EDSALL,
Clerk C. C. P., A. C., Ind.

43 Whereupon, at the instance of complainant's solicitors, a writ of subpœna issued herein, which writ, with the return of service thereon endorsed, is in the words following, to wit:

UNITED STATES OF AMERICA, *District of Indiana:*

The President of the United States of America to the marshal of the district of Indiana, Greeting:

You are hereby commanded to summon Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, Byron Hueston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Jr., Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Harry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew C. Hoffmeister, Nancy J. McCurdy, Alfred Hattersley, Oscar Simons, and John H. Bass, citizens of and resident in the State of Indiana, if they be found in your district, to be and appear in the circuit court of the United States for the district of Indiana aforesaid, at Indianapolis, on the first Monday in April next, to answer a certain bill in chancery filed and exhibited in said court against them by George P. Bissell, citizen of and resident in the State of Connecticut. Hereof they are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness Honorable Morrison R. Waite, Chief Justice of the United States, this 28th day of February, A. D. 1879, and the one
44 hundred and 3d year of the Independence of the United States of America.

Attest: [SEAL.] W. P. FISHBACK, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1879; otherwise the said bill may be taken *pro confesso.*

W. P. FISHBACK, *Clerk.*

DISTRICT OF INDIANA:

I received this writ at Indianapolis, in said district, at 4.15 o'clock p. m., on the 28 day of February, A. D. 1879, and served the same in Allen county as follows: 1st day of March, 1879, by reading and — copy on Abraham G. Barnett, Nancy C. Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Jr., Henry Burgess, Charles A. Zollinger, Hannah Kamm; Nancy J. McCurdy, by name of Mary J. McCurdy; Alfred Hattersley, Oscar Simons, & John H. Bass; and on Andrew Kamm, by copy left at his last usual place of residence; and by order of pl't'f's att'y-, Coombs, Morris & Bell, served on Susan M. Barnett, Byron Heuston Barnett, William Barnett, minors, by copy left with their parents, Abraham G. and Nancy C. Barnett; and on George Kamm, Charles Kamm, Harry Kamm, Anna Kamm, & Nellie Kamm, minors, by copy left with Hannah Kamm, their mother. A return of not found is entered as to Andrew C. Hoffmeister, by order of Coombs, Morris and Bell, pl'ff's att'ys. Elizabeth Rudisill not found in my bailiwick.

WM. W. DUDLEY, *U. S. Marshall*,
By JONATHAN CRANN, *Deputy.*

Fees:

R. R. fair & livery	10 40
Hotel	1 75
Service	44 00
Copies	2 80
Return	10
	$59 05

45 And afterwards, to wit, at the November term of said court, in recess thereof, on the 7th day of April, A. D. 1879, the following further proceedings in the above-entitled cause, were had, to wit:

Come now the defendants, Oscar A. Simons, John H. Bass, John E. Hill, Jr., by R. S. Taylor, their solicitor, and enter their appearance herein.

At the same time comes the defendant, Henry Burgess, by Jenison and Alden, his solicitors, and enters his appearance herein.

And afterwards, to wit, at the November term of said court, in recess thereof, on the 11th day of April, A. D. 1879, the following further proceedings in the above-entitled cause were had, to wit:

Comes now John E. Hill, Jr., by W. H. Withers, Esqr., his solicitor, and enters his appearance herein.

And afterwards, to wit, at the November term of said court, in recess thereof, on the 14th day of April, A. D. 1879, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Andrew Kamm and Hannah Kamm, by Mess. Jenison and Alden, their solicitors, and enter their appearance herein.

And afterwards, to wit, at the November term of said court, on the 23rd day of April, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceed-
46 ings in the above entitled cause were had, to wit:

Comes now the complainant, by Mess. Coombs, Morris and Bell, his solicitors, and by leave of court now files his amendment to the bill of complaint herein in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Your orator, George P. Bissell, shows unto your honors that on or about the 28th day of February, 1879, he exhibited his original bill in this honorable court against Abraham G. Barnett, Henry Rudisill, and others, charging that the said Abraham G. Barnett and John H. Barnett, since deceased, on or about the 15th day of July, 1869, borrowed from George P. Bissell & Co. the sum of $8,000.00 for the term of ten years, and to secure the same the said John H. Barnett executed his trust deed, conveying to your orator certain lots in the city of Fort Wayne in trust to secure the payment thereof, and that the said Henry Rudisill received $5,000.00 of said loan, and executed his bond conditioned for the payment of said sum of $5,000.00 to your petitioner. And afterwards, on the 13th day of September, 1871, the said Henry Rudisill and Elizabeth E. Rudisill executed a mortgage intending to convey to said John H. Barnett a certain tract of land of about 13 acres, to include the flouring mill of said Rudisill on the St. Josephriver, in Allen county, 47 Indiana, but that by a mistake in drafting said mortgage the description of said land did not include said mill. That afterwards the said John H. Barnett died testate, disposing of said mortgaged premises in Fort Wayne, as charged in said original bill, and naming the said Abraham G. Barnett his executor. That afterwards, on the — day of ——, 18—, the said Henry Rudisill, desiring to sell all of said 13 acres except a small lot and said mill, under the belief that said Abraham G. Barnett was the executor of said John H. Barnett, procured him to enter a release of that part of said land he was about to sell, on the margin of the record of said mortgage, & then sold said land, as charged in said original bill, but that said release was void because the said Abraham G. Barnett had never qualified as such executor. Your orator therein, praying a reformation of said mortgage so executed by the said Rudisill, and the foreclosure of both of said mortgages, as by reference to his said original bill will more fully and at large appear.

And your orator further shows, by way of amendment to his said original bill, that since the filing thereof he has discovered that when the said Henry Rudisill applied to said Abraham G. Barnett to release the said land from his said mortgage, so that he could sell the same, it was discovered that the d*i*scription of said premises
48 was so imperfect that it was doubtful whether the same would include said mill, and thereupon, to correct said imperfect description and make the security for the payment of said $5,000.00, with interest, ample and sufficient, the said Henry Rudisill and Elizabeth E. Rudisill, his wife, on the 23d day of January, 1875, executed a new mortgage conveying to the said Abraham G. Barnett, as the executor of said John H. Barnett, deceased, the said mill & land thereunto adjoining and described as all that tract of land known as the St. Joseph's mill property, in section thirty-five, township 31 north, of range 12 east, commencing at a point where the west bank of the St. Joseph's river intersects the north line of the Wells' pre-emption; thence north with the center of the St. [Joseph's] road to a point where the St. Joseph's turnpike intersects the same; thence east along the center of said pike to the west quarter-post of section 36, in township 31 north, of range 12 east; thence southeasterly with the eastern boundary of said mill site to the bank of the St. Joseph's river; thence westerly with said river to the place of beginning, "to secure the payment of the amount named and the performance of the conditions recited in a certain bond executed by Henry J. Rudisill, and to John H. Barnett, dated July 15th, 1869," being the same bond mentioned and a copy exhibited in said original bill, which last-mentioned mortgage
49 was duly recorded in said county on the 26th day of January, 1875, a copy of which is filed herewith as an exhibit, marked "A A," which your orator prays may be taken as a part of this.

And your orator avers that said last-mentioned mortgage was executed by the said Rudisill and wife for the reason aforesaid, and also to induce the said Abraham G. Barnett to release said thirteen acres of said land from said original mortgage, so that he could sell the same; and although the said release of said land from said

Rudisill's original mortgage was void, as charged in said original bill, still it enabled the said Henry Rudisill to sell said land; and he did, on the 23d day of January, 1875, sell & convey the same to the said defendants, Burgess & Zollinger, and said J. J. Kamm, deceased, for the sum & price of ten thousand dollars, who purchased the same in good faith, they and the said Rudisill believing that said release was valid, and that the deed from said Rudisill would invest them with an unincumbered title to the land so purchased.

Your orator further represents that since the filing [of] his original bill he has discovered that Elizabeth Rudisill, the mother of the said Henry Rudisill, held an old mortgage on said mill & mill scite and the lot known as the mill lot, hereinafter more particularly described, to secure the payment of eight hundred dollars per annum to her during her natural life, which is still in full force
50 and unsatisfied.

And your orator further shows that the said Henry J. Rudisill sold and conveyed all of the land embraced in his said mortgage to the said John H. Barnett, deceased, as stated in said original bill, except said mill & mill site and a lot known as the mill lot, more particularly described as bounded on the east by the St. Joseph's road, on the south by an alley, on the north of lots 1, 2, 3, 4, & 5, in Burgess, Zollinger, & Kamm's addition to Fort Wayne, as the same is recorded in the recorder's office of said county, on the west by an alley east of lots 9, 10, & 11, in said Burgess, Zollinger, & Kamm's addition, and on the north by Eckert's addition to Fort Wayne, as the same is recorded in said recorder's office.

And your orator further avers that the said Burgess, Zollinger, & Kamm laid — that part of the land purchased by them from the said Henry J. Rudisill which was embraced in the mortgage due from the said Henry J. Rudisill and the costs of this suit properly charged thereon, then the said lots in Burgess, Zollinger, & Kamm's addition to the city of Fort Wayne, or enough thereof to pay said deficiency, be sold in like manner, and that the money arising from said several sales after the payment of costs as aforesaid be
51 applied in payment of so much of the sum so found due upon the said mortgage executed by said John H. Barnett, & that said mortgaged premises, to wit, all of lot one hundred and five on the original plat of the city of Fort Wayne, except ten feet off of the east side thereof and part of lot 106 on said original, as described in said mortgage, or so much thereof as may be necessary to make the residue of the sum so found due to your orator, and they may be sold in like manner; and that your orator may have such other & further relief in the premises as justice & equity may require.

COOMBS, MORRIS & BELL,
Solic. for Comp'l't.

EXHIBIT "A A."

This indenture witnesseth: That Henry J. Rudisill and Elizabeth E. Rudisill, his wife, of Allen county, in the State of Indiana, mortgage & warrant to Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased, of Allen county, in the State of Indiana, for the sum of one dollar, the following real estate, situate in Allen county and State of Indiana, and described to wit: All that tract of land known as the St. Joe mill property, in section 35, township 31 north, of range 12 east, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption; thence with the centre of the St. Joe road northerly to a point to where the St. Joe turnpike intersects the same; thence easterly along the centre of said 52 turnpike to the west quarter-post of section 36, in said township and range; thence southeasterly with the eastern boundary of said mill site to the bank of St. Joe river; thence westerly with said river to the place of beginning, containing eighteen acres, more or less, to secure the payment of the amount named and the performance of the conditions recited in a certain bond executed by Henry J. Rudisill to John H. Barnett, dated July 13, 1869, and recorded in the miscellaneous record No. 6, page 236, of the records of Allen county, Indiana; and the mortgagor expressly agree- to pay the sum of money above secured, with any relief from valuation or appraisement laws.

In witness whereof the mortgagors have hereunto set their hands and seals this (23rd) twenty-third day of January, A. D. 1875.

HENRY J. RUDISILL.
ELIZABETH E. RUDISILL.

STATE OF INDIANA, } *sct:*
Allen County, }

Before me, Warren H. Withers, a notary public in and for said county, this 23rd day of January, 1875, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, acknowledged the execution of the annexed mortgage.

Witness my hand & seal this twenty-third day of January, A. D. 1875.

W. H. WITHERS,
Notary Public.

Copy of indorsement: Received for record this 26th day of Jan., 1875, at 11½ a. m., and recorded in Rec. 26, page 564. John M. Koch, recorder, Allen county.

53 And afterwards, to wit, at the May term of said court, on the 5th day of May, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Henry Burgess, Hannah Kamm, and Andrew Kamm, by Mess. Jenison and Alden, their solicitors, and file their demurrer herein in the words following, to wit:

In the Circuit Court of the United States of America in and for the District of Indiana. In Chancery.

GEO. P. BISSELL

vs.

ABRAHAM G. BARNETT, NANCY CATHARINE BARNETT, SUSAN M. BARNETT, Byron Heuston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar Simons, John H. Bass, Mary Ann Wall, Watson Wall, Henry Rudisill, and Elizabeth Rudisill.

The joint and several demurrer of Henry Burgess, Hannah Kamm, and Andrew Kamm, three of the defendants to the amended bill of complaint of George P. Bissell.

Said defendants, Henry Burgess, Hannah Kamm, and Andrew Kamm, by protestation, not confessing or acknowledging all 54 or any of the matters and things in the said complainant's amended bill to be true as therein alleged, demur thereto, and show for cause of demurrer:

1st. That the said complain-t hath not in and by his said amended bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against any one or all of these defendants.

II. That, as appears from the allegations and statements contained in said amended bill, this court has no jurisdiction to hear and determine any of the matters and things in said amended bill alleged as against these defendants or any one of them.

III. That it appears by the said amended bill that the same is exhibited by the said complainant against these defendants and twenty-four others as defendants thereto for several distinct matters and causes, in several of which, as appears by the said amended bill, these defendants or any of them are in no way interested, which several matters are distinct and independent causes of action having no relation to each other, whereby the proceedings in this suit will become extremely and unnecessarily complicated, and these defendants put to unnecessary charges and expenses in matters which in no way relate to [or] concern them.

IV. That it appears by the said amended bill that it is necessary that the estate of John H. Barnett, deceased, therein named, 55 brother of & joint obligor with the defendant, A. G. Barnett, on the eight $1,000 bonds, for the collection of which this suit is instituted, should be represented in this suit, but no legal representative of the said John H. Barnett's estate is named or made a party thereto.

Wherefore and for divers other errors, imperfections, and good causes of demurrer these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said amended bill or any of the matters or things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

JENISON & ALDEN,
Solicitors for Defendants, Henry Burgess,
Hannah Kamm, & Andrew Kamm.

I hereby certify that, in my opinion, the foregoing demurrer is well taken in law.

S. R. ALDEN.

At the same time come the defendants, Oscar A. Simons and John H. Bass, by R. S. Taylor, Esq., their solicitor, and file their demurrer herein in the words following, to wit:

In the Circuit Court of the United States for the District of Indiana.
In Chancery.

George P. Bissell, Plaintiff,

vs.

Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, Byron Huston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Henry Burgess, Charles A. 56 Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Harry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar A. Simons, John H. Bass, Mary Ann Wall, and Watson Wall, Defendants.

The demurrer of Oscar A. Simons and John H. Bass, two of said defendants, to the bill of George P. Bissell, complainant.

The said defendants, Oscar A. Simons and John H. Bass, by protestation, not confessing any of the things in said bill alleged to be true, do demur in law to the said bill, and for causes of demurrer show the following, namely:

1. That upon the face of the facts alleged in said bill it appears that this court has no jurisdiction to have and determine as against these defendants, or either of them, any of the matters alleged in said bill.

2. That it appears by the said bill that the same is exhibited against these defendants and twenty-three others for several and distinct matters and causes, in many whereof, as appears by said bill, these defendants and each of them are not in any manner interested or concerned, and ought not to be implicated, which several matters are distinct and independent causes of action, having no relation to each other.

57 3. That the said plaintiff hath not in his said bill alleged any facts upon which he is entitled in a court of equity to any relief against these defendants or either of them.

Wherefore, and for divers other good causes of demurrer appearing on the face of said bill, these defendants demur to the same, and pray the judgment of this honorable court whether they shall be compelled to make any other or further answer to said bill, and they pray to be dismissed hence with their costs.

TAYLOR & MORRIS,
Solicitors for the said Defendants.

I certify that in my opinion the foregoing demurrer is well taken in law.

R. S. TAYLOR.

And afterwards, to wit, at the May term of said court, on the 23rd day of May, A. D. 1879, before the Honorable Walter Q. Gresham, judge as aforesaid, the following proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Henry J. Rudisill and Elizabeth Rudisill, by W. H. Withers, their solicitor, and file their answer herein in the words following, to wit:

STATE OF INDIANA, *to wit:*

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL *vs.* ABRAHAM G. BARNETT and Others.

58 The answer of Henry J. Rudisill and Elizabeth E. Rudisill, his wife, to the bill of complaint of George P. Bissell and the cross-bill of Elizabeth Rudisill.

These defendants, for answer to said original bill, say that they admit all the allegations therein contained, except the allegation that the mortgage executed by them was intended to embrace the Saint Joseph's mill, which allegation they deny. They also admit all the allegations in the said cross-bill of the said Elizabeth Rudisill, and consent that such decree may be entered therein as justice may require.

W. H. WITHERS,
Sol. for Rudisill and Wife.

We hereby constitute and appoint Warren H. Withers, Esqr., of Fort Wayne, Indiana, our true and lawful attorney, and do hereby authorize him as such to appear for us in any suit that may be instituted by George P. Bissell against us, or against us *or* others, in the circuit court of the United States for the district of Indiana, and for us and each of us to waive the issuing and service of process in such suit, whether at law or chancery, and enter our appearance in suit as fully to all intents and purposes as if we should have each personally appeared in court to answer the same.

Witness our hands and seals this 12th day of March, 1879.

HENRY J. RUDISILL.
ELIZABETH E. RUDISILL.

STATE OF CALIFORNIA, }
San Bernardino County, } *ss:*

59 Personally appeared before me, the undersigned, a notary public of said county, Henry J. Rudisill and Elizabeth E. Rudisill, and severally acknowledged the execution of the above power of attorney.

Witness my hand and official seal this 14th day of March, 1879.

[SEAL.] JAMES P. EVANS, *N. P.*

And at the same time comes Elizabeth Rudisill, by W. H. Withers, her solicitor, and files her cross-bill herein in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Elizabeth Rudisill, humbly complaining, showeth unto your honors that on or about the 28th day of February, 1879, George P. Bissell exhibited his bill of complaint in this honorable court against Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, Byron H. Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Jr., Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, Charles Kamm, Henry Kamm, Annie Kamm, Nellie Kamm, Andrew Hoffmeister, Mary J. McCurdy, Henry J. Rudisill, and Elizabeth E. Rudisill, his wife, and this complainant praying the foreclosure of a mortgage executed by John H. Barnett, and conveying certain lots in the city of Fort Wayne to the said complainant to secure a loan of eight thousand dollars ($8,000.00), and therein alleging that the said Henry J. Rudisill received five thousand 60 dollars ($5,000.00) of the consideration of said mortgage, and executed to the said John H. Barnett his bond conditioned for the payment to the said George P. Bissell of five thousand dollars ($5,000.00) of the loan, with interest, and afterwards executed a mortgage to said John H. Barnett, which was intended to convey to said Barnett his mill on the Saint Joseph's river and thirteen (13) acres of land adjoining thereto, to secure the performance of said bond, but by a mistake in the description of the land in said mortgage did not embrace said mill, and further charging that on or about the 23rd day of January, 1875, the said Henry J. Rudisill procured the said Abraham G. Barnett as the pretended executor of the said John H. Barnett, deceased, to release this said thirteen (13) acres of land, or the greater portion thereof, from said mortgage, which he thereupon sold, and charging that said pretended release was void for the reasons therein stated, and praying a re-formation of said mortgage and the foreclosure thereof, and the sale of said mill and mill lot.

That afterwards, on the 23d day of April, 1879, the said complainant filed an amendment to said bill charging that the said Henry J. Rudisill and wife, at the time he so procured the said pretended release, executed another mortgage to the said Abraham G. Barnett on the said mill and land connected therewith, and known

as the Saint Joseph's mill site, by a correct description thereof, conditioned for the payment or performance of the conditions of
61 the said bond so given by the said Rudisill to the said John H. Barnett, and alleging that said mill and mill site and lot so described in said amendment was incumbered by a prior mortgage to this cross-complainant.

This cross-complainant disclaims all interest in and to the premises mentioned in said bill, except as to the said mill, mill site, and mill lot, which is more particularly described as follows, to wit: All that part of the southeast fraction of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, lying east of the centre of the Saint Joseph's State road and the said mill lot, and named in complainant's bill and the said amendment thereto.

And this cross-complainant avers and charges that on the 30th day of October, 1860, the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, executed and delivered a mortgage conveying to her the said mill, mill site, and mill lot, as more particularly described above, together with other property, to secure to her an annuity of eight hundred dollars ($800.00) per annum during her natural life, payable in quarterly installments of two hundred dollars ($200.00) each, without any relief whatever from valuation and appraisement laws, on the first days of January, April, July, and October of each and every year during the term aforesaid, a copy of which said mortgage is filed herewith as an exhibit, marked "A," which she prays may be taken as a part of this her cross-bill.

And this cross-complainant further says that at the request
62 of the said Henry J. Rudisill she has from time to time released from said mortgage so as aforesaid executed to her all the lands therein described, except the said mill, mill lot, and mill site more particularly described above as aforesaid, and named in the complainant's bill and in said amendment thereof.

And this cross-complainant further avers and charges that her lien upon said premises described in the said complainant's bill and the said amendment thereto, except as to the thirteen (13) acres lying west of the Saint Joseph's State road, is prior and superior, by virtue of the said mortgage so as aforesaid executed and delivered to her, a copy of which is filed herewith and marked Exhibit "A," to the claim of the complainant, and the said defendants thereto or therein.

And this cross-complainant further says that the said Henry J. Rudisill has for a long time past failed to pay said annuity of eight hundred dollars ($800.00) per year, or any part thereof, and that there is now due and owing to her on said mortgage security the sum of three thousand three hundred and fifteen dollars ($3,315.00) up to the first day of July, 1869, and that there will become due the further sum of eight hundred dollars ($800.00) for each and every year during her natural life, payable quarterly as aforesaid.

She therefore prays that the said George P. Bissill and the said defendants to said complainant's bill may be required to
63 answer all the matters herein stated and charged, and that an account may be taken under the direction of this court

of what is now due to this cross-complainant for her unpaid annuity, and also of the value of her accruing annuity for the remainder of her natural life, she being now of the age of seventy-three (73) years.

And she prays that her said mortgage may be foreclosed as against the said complainant and the defendants to said complainant's bill; that the said premises covered by and subject to her said mortgage, to wit, all that part of the southeast fraction of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, lying east of the centre of the Saint Joseph's State road and the said mill site, named in the complainant's bill and the said amendment as the mill, mill site, and mill lot, be sold as in complainant's bill prayed, and that out of the proceeds arising from said sale she may first be paid the sum found by the direction of this court to be due her and the value of her future annuity, or that she may be paid the sum so found due to her, and that said premises may be sold subject to her said prior mortgage; that said sale of said premises may be made without any relief whatever from valuation and appraisement laws, and that she may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

W. H. WITHERS,
Sol. for Cross-Complainant.

64 STATE OF INDIANA, }
Allen County, } *ss:*

The said Elizabeth Rudisill, the cross-complainant named in the foregoing cross-complaint, being duly sworn, on her said oath says that the matters and things, all and singular, set forth in the foregoing cross-complaint are true as therein alleged and averred, as she varily believes.

ELIZABETH RUDISILL.

Subscribed and sworn to before me this 7th day of May, 1879.
[SEAL.] CEO. D. CRANE,
Notary Public.

EXHIBIT "A."

Copy of Mortgage.

This indenture, made this thirtieth (30th) day of October, A. D. 1860, by and between Henry J. Rudisill and Elizabeth E. Rudisill, of Allen county, Indiana, of the one part, and Elizabeth Rudisill, of Allen county, Indiana, of the other part, witnesseth:

That, in consideration of the covenants, promises, and agreements of the [said] Henry J. Rudisill, hereinafter contained, and in further consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, have bargained and sold, and by these presents do grant and convey, to the said Elizabeth Rudisill, and to her heirs and assigns forever, the following premises, situate in Allen county, Indiana, to wit: The south half of the northeast

quarter, containing fifty-seven and $\frac{36}{100}$ (57.36) acres; the north
65 half of the southeast quarter, containing fifty-eight and $\frac{12}{100}$
(58.12) acres, and the southeast fraction, containing twenty
and $\frac{22}{100}$ (20.22) acres, all in section thirty-five (35), in township
thirty-one (31) north, of range twelve (12) east, saving and excepting
therefrom all that part of said premises lying south of a line
running westerly from the mill thereon, and west of the Saint Joseph
State road as now traveled, supposed to contain about seven (7)
acres, and also saving and excepting therefrom that portion of said
premises heretofore sold and conveyed to Henry C. Gray, Maria C.
French, and Julia A. Freeman; to have and to hold the premises
above described to the said Elizabeth Rudisill and to her heirs and
assigns forever, together with all and singular the appurtenances
thereunto belonging or in anywise appertaining, to her own proper
use, benefit, and behoof: Provided, always, nevertheless, and these
presents are made upon the express condition, that whereas, in consideration
of the conveyance of the above-described premises this
day made by the said Elizabeth Rudisill to the said Henry J. Rudisill,
the said Henry J. Rudisill has covenanted, agreed, and promised,
and by these presents does hereby, for himself, his heirs, executors,
administrators, and assigns, covenant, promise, and agree, to
and with the said Elizabeth Rudisill and her assigns, to pay to the
said Elizabeth Rudisill, or to her assigns, the sum of eight
66 hundred dollars ($800) per annum for and during the full
term of her natural life, in manner following—that is to say,
two hundred dollars ($200) on the first days of January, April, July,
and October of each and every year during the term aforesaid.

Now, should the said Henry J. Rudisill, his heirs, executors, administrators, and assigns, pay or cause to be paid to the said Elizabeth Rudisill, or to her assigns, the sums of money aforesaid at the times and in the manner aforesaid, and without any relief from valuation or appraisement laws, then, and in that case, these presents, and all the estate hereby granted, shall cease and be void, anything herein contained to the contrary in anywise notwithstanding.

In witness whereof the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, have hereunto set their hands and seals the day and year first above written.

HENRY J. RUDISILL. [SEAL.]
ELISABETH E. RUDISILL. [SEAL.]

STATE OF INDIANA, } ss:
Allen County, }

Personally came before me, a notary public in and for said county, the said Henry J. Rudisill and Elisabeth E. Rudisill, his wife, and acknowledged the execution of the above and foregoing instrument for the uses and purposes therein set forth.

Given under my hand and official seal this 30th day of October, 1860.

[SEAL.]

W. H. WITHERS,
Notary Public.

67 I acknowledge myself security for costs on this cross-bill.

W. H. WITHERS.

And afterwards, to wit, at the May term of said court, in recess thereof, on the 23rd day of July, A. D. 1879, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Watson Wall and Mary Ann Wall, by C. H. Aldrich, their solicitor, and file their answer herein in the words following, to wit:

United States Circuit Court.

George P. Bissell *vs.* Abraham G. Barnett *et al.*

The answer of Watson Wall and Mary Ann Wall, his wife, two of the defendants, to the bill of complaint of George P. Bissell, complainant.

These defendants, for answer to so much of said complainant's said bill of complaint as they are advised it is necessary or material for them to make answer to, answering say they believe it to be true that the said John H. Barnett borrowed the sum of $8,000.00 from said George P. Bissell & Co., which was secured by a deed of trust or mortgage upon the separate property of said John H. Barnett, as alleged in said complainant's bill of complaint, and that the said Henry J. Rudisill took $5,000.00 of the said $8,000.00 so borrowed and executed his bond and mortgage to secure the same, as charged in said bill. They also admit that said John H. Barnett died testate, and that by his last will he devised the said lot de- 68 scribed in said trust deed, part of lot 106 in the original plat of the city of Fort Wayne, and bounded as therein described, to this defendant, Mary Ann Wall, for life, as charged in said bill of complaint. They further say they know of no reason why the said several mortgages should not be foreclosed and the said mortgaged premises sold in the order prayed in said complainant's bill of complaint, and they pray that the rights of the said Mary Ann may be protected so far as the same can be done in any decree which may be rendered in said cause.

CHARLES H. ALDRICH,
Solicitor for Defendants.

We, Watson Wall and Mary Ann Wall, his wife, hereby nominate and appoint Charles Aldrich as our true and lawful attorney, for us and in our names to enter an appearance for us as defendants in the suit of George P. Bissell against Abraham G. Barnett and others, now pending in the circuit court of the United States for the district of Indiana, and take such action therein as will, in his judgment, protect our interest in the subject-matter of said suit.

WATSON WALL. [SEAL.]
MARY A. WALL. [SEAL.]

State of Missouri, *City and County of St. Louis:*

Personally came before me, the undersigned, a notary public of said county, the above-named Watson Wall and Mary Ann Wall,

his wife, who acknowledged the execution of the foregoing power of attorney for the uses & purposes therein expressed.

69 Given under my hand and seal this 12th day of June, 1879.

[SEAL.]

JULIUS ROBERTSON,
Notary Public, St. Louis Co.

And at the same time comes George P. Bissell, by Coombs, Morris & Bell, his solicitors, and files his answer to the cross-bill of Elizabeth Rudisill in the words following, to wit:

In the Cir. Court U. S.

GEORGE P. BISSELL, Trustee, *vs.* ELIZABETH RUDISILL & Others.

The said complainant comes and for answer to the cross-bill of the said Elizabeth Rudisill filed in this case says that he admits all the facts in said cross-bill set forth, except the amount which the said Elizabeth Rudisill claims to be due her on the mortgage in said cross-bill set forth, which amount therein set forth he says is not due & owing on said mortgage; wherefore he prays that the actual sum due or to become due her, if anything, may be ascertained.

COOMBS, MORRIS & BELL,
Sol's for Complainant.

And afterwards, to wit, at the November term of said court, on the 4th day of February, A. D. 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by his solicitors, and files his amended bill herein in the words following, to wit:

70 To the honorable the judges of the circuit court of the United States for the district of Indiana:

George P. Bissell, of Hartford, Connecticut, and a citizen of the State of Connecticut, brings this his bill against Abraham G. Barnett & Nancy Catharine Barnett, Susan M. Barnett, Byron Houton Barnett, and William Barnett, his infant children; Susan B. Shoaff and John A. Shoaff, her husband; John E. Hill, Henry Burgess, Charles A. Zollinger; Hanna Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm, the widow and children of John J. Kamm, deceased; Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar Simons, and John H. Bass, who are all citizens of the State of Indiana; and Mary Ann Wall and Watson Wall, her husband, who are citizens of the State of Missouri; and Henry Rudisill and Elizabeth Rudisill, his wife, who are citizens of the State of California.

And thereupon your orator complains and says that on or about the 15th day of July, 1869, John H. Barnett, since deceased, and the said Abraham G. Barnett and Henry J. Rudisill applied to George

P. Bissell & Co., bankers, of Hartford, in the State of Connecticut, through their agent, John Hough, of the State of Indiana, for the loan of eight thousand dollars for the term of ten years; and it was thereupon agreed that the said George P. Bissell & Co. should advance said sum and take the eight bonds of the said John H. and Abraham G. Barnett for the sum of $1,000.00 each, to be se-
71 cured by a deed of trust to your orator for the lots of said John H. Barnett, hereinafter described, and that the said Henry Rudisill should take five thousand dollars of the sum thus loaned and assume the payment of said sum to your orator according to the term- of said bonds.

And thereupon the said George P. Bissell & Co. did advance said sum of $8,000 00 to the said John H. and Abraham G. Barnett, who thereupon executed their eight coupon bonds for the sum of one thousand dollars each, bearing date of July 15th, 1869, and payable to the bearer on the 15th day of July, 1879, at the office of the said George P. Bissell & Co., in the city of Hartford aforesaid, with interest at the rate of nine per cent. per annum, payable semi-annually, as specified, in twenty semi-annual interest coupons to each of said bonds, a specimen copy of which said bonds and coupons is filed herewith as an exhibit, marked "A," which your orator prays may be taken as part of this his bill of complaint. And on the same day the said John H. Barnett executed and delivered to your orator his certain deed conveying to your orator the lots therein described, to wit: All of lot one hundred and five on the original plat of the city of Fort Wayne, except a strip ten feet wide off of the east side thereof; also a part of lot one hundred and six on said original plat, commencing at a point on the east line of said lot thirty feet south of the northeast corner thereof, running thence south along said line twenty feet; thence west at right angles therewith to the west line of
72 said lot: thence north along said west line twenty feet; thence east at right angles therewith to the place of beginning, in trust to secure the payment of the said eight bonds and coupons, which deed was duly recorded in the recorder's office of said county of Allen on the 16th day of July, 1869, in book 17, on pages 116 to 119, a copy of which deed is filed herewith, marked Exhibit "B," which your orator also prays may be taken as part of this his bill of complaint.

And your orator further shows that at the same time five thousand dollars of the said eight thousand dollars thus loaned was with the knowledge & consent of your orator advanced and paid over to the said Henry Rudisill, who thereupon executed and delivered to the said John H. Barnett his bond in the penal sum of ten thousand dollars, with a condition thereto wherein, after reciting that he had received from the said Barnett the sum of $5,000.00, part of a loan made by J. H. Barnett and Abraham G. Barnett for the sum of eight thousand dollars of the said George P. Bissell (thereby meaning the said George P. Bissell & Co.), of Hartford, in the State of Connecticut, secured by the eight several bonds of $1,000 of said Abraham G. Barnett & John H. Barnett, bearing date of the 15th of July, 1869, with nine per cent. interest, said bonds secured by a trust

deed to said George P. Bisssell executed by said John H. Barnett and recorded July 16, 1869, in book 17, pages 116 to 119 of the records of said Allen county, State of Indiana, which said sum of five
73 thousand dollars the said Rudisill had assumed to pay according to the terms of said bonds, with the interest thereto, at the rate of nine per cent. per annum, it was conditioned that if the said Rudisill should well and truly pay said sum of ($5,000) five thousand dollars of said bonds, with the interest thereon as it became due, according to their terms, tenor, & effect, then said obligation to be void; otherwise to remain in full force and virtue in law; a copy of which bond is also filed herewith marked Exhibit "C," and made a part of this bill of complaint. The said Henry Rudisill at the time of the execution of the said bond promised and agreed with the said John H. Barnett and your orator that he would execute a mortgage on the land hereinafter mentioned to secure the performance of the conditions to said bond and as additional security for the debt so due to your orator as such trustee.

And afterwards, to wit, on the 13th day of December, 1871, in pursuance of said agreement and as additional security for the payment of said bonds, the said Henry J. Rudisill and Elizabeth Rudisill, his wife, did execute and deliver to the said John H. Barnett their certain mortgage deed conveying to him the land therein described, to wit: All that portion of the fractional southeast quarter of section thirty-five, township thirty-one north, of range twelve east, bounded on the east by the St. Joseph's river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal,
74 and on the north by the lands of Julia A. Freeman, estimated to contain thirteen acres, with a condition in the words and figures following:

"To secure the payment of the following-described bond, of even date herewith; to secure the payment to George P. Bissell of certain coupon bonds bearing date July, 15th, 1869, to the amount of five thousand dollars, as fully recited in said bond given by said mortgagor to said mortgagee. And the mortgagor expressly agrees to pay the sum of money above secured without any relief from valuation and appraisement laws, and if any part of the debt or interest secured by this mortgage is not paid when due said mortgagor further agrees to pay to said mortgagee all attorneys' fees and other costs and charges for the collection thereof, payable and collectable in manner aforesaid," which mortgage was duly recorded in the recorder's office of said county on the 15th day of January, 1872, in mortgage record 21, page 276, a copy of which last-mentioned mortgage is filed herewith as an exhibit, marked "D," which your orator also prays may be taken as part of this bill.

And your orator further represents that the said John H. Barnett on or about the — day of January, 1872, died testate, and by his last will and testament devised the lot described in the said deed of trust as part of lot 106 on the original plat of the city of Fort Wayne to his sister, the said Mary Ann Wall, for her natural
75 life, with remainder to the said Byron Houston Barnett, infant son of the said Abraham G. Barnett, with remainder to

the said Abraham G. Barnett and his heirs, and also devised the said lot 105 on said original plat of Fort Wayne to the said Susan B. Shoaff for and during her natural life, with remainder to the said James W. Barnett, another infant son of the said Abraham G. Barnett, with remainder to the said Abraham G. Barnett and his heirs, which will was duly probated before William S. Edsall, clerk of Allen circuit court, on the 7th day of February, 1872, and recorded in the records of wills of said county, a copy of which will is filed herewith, marked Exhibit "E," which your orator also prays may be taken as part of this bill of complaint.

And your orator further shows that the said Henry J. Rudisill, on the 23d day of January, 1875, without the knowledge or consent of your orator, sold and conveyed all of the land thus mortgaged to said John H. Barnett, except a small lot in the northeast corner thereof, known as the mill lot, and hereinafter more particulary described, and that part lying between the St. Joseph's road and the St. Joseph's river, together with other lands, to the said Henry Burgess, Charles A. Zollinger, and John J. Kamm, deceased, and thereupon the said Henry J. Rudisill procured the said Abraham G. Barnett, who had been named in the will of the said John H. Barnett as his executor, but who had never taken out letters testamentary or filed a bond, or in any manner qualified as such executor, to 76 enter upon the margin of the record of said mortgage so executed by said Rudisill and wife to said John H. Barnett a pretended release of said land from the lien of said mortgage in the words following:

> "I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that part of the S. E. ¼ of section 35, t'p 31, R. 12 east, this day conveyed by the said Henry J. Rudisill to H. Burgess, Chas. A. Zollinger, & J. J. Kamm.
>
> "Witness my hand and seal as such executor Jan. 23, 1875.
>
> "ABRAHAM G. BARNETT.
>
> "*Executor of the Estate of John H. Barnett, Deceased.*"
>
> Attest: J. M. KOCH, *Rec. A. C.*

And your orator avers that the said Abraham G. Barnett was not at that time, and never had been, the executor of the said John H. Barnett, deceased, and had no power, right, or authority to execute such release, and that such pretended release is absolutely null and void.

And your orator further shows that the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, at the time of the execution of said pretended release, and in consideration thereof, executed & delivered to the said Abraham G. Barnett (as such executor of the estate of John H. Barnett, deceased) another mortgage conveying to him the premises therein described, to wit: "All that tract of land known as the St. Joe mill property, in section 35, township 31, north, of range 12 east, commencing at a point where the west

77 bank of the St. Joe river intersects the north line of the Wells pre-emption; thence north with the centre of the St. Joe northerly to a point where the St. Joe turnpike road intersects the same; thence easterly along the centre of said turnpike road to the west quarter-post of section 36, in said township and range; thence southwestwardly with the eastern boundary of said mill site to the bank of the St. Joe river; thence westwardly with said river to the place of beginning, containing 15 acres, more or less, to secure the payment of the amount named and the performance of the conditions recited in a certain bond executed by Henry J. Rudisill to John H. Barnett, dated July 15, 1869, and recorded in the miscellaneous record No. 6, page 236, of the records of Allen county, Indiana," a copy of which mortgage is filed herewith, marked Exhibit "A A," which your orator also prays may be taken as part of this his bill of complaint.

And your orator further shows that the said mill property thus mortgaged was, at the time of the execution of said mortgage, and still is, incumbered by a prior mortgage executed by the said Henry J. Rudisill and wife to his mother, Elizabeth Rudisill, to secure the payment of an annuity of eight hundred dollars per annum during her life; that she is still living, & claims that there is now due to her thereon a large sum for arrearages of said annuity, the amount of which is unknown to your orator.

78 And your orator further shows that the said Henry Burgess, Charles A. Zollinger, and John J. Kamm, on or about the 2d day of February, 1875, caused the greater part of said land so deeded to them by the said Henry J. Rudisill and wife to be surveyed and laid out into lots, streets, and alleys, and caused a plat thereof to be recorded in the recorder's office of said county of Allen as Burgess, Zollinger, and Kamm's addition to the city of Fort Wayne, a copy of which recorded plat, traced from the record thereof, is filed herewith and marked Exhibit "F," which your orator also prays may be taken as part of this bill of complaint.

And your orator further shows that the Bloomingdale road, described as the southern boundary of the 13 acres of land so mortgaged by the said Rudisill to the said John H. Barnett, had been long used as a road, but had never been surveyed or laid out as a public road: that the same run from the St. Joseph's road along Burgess avenue, as represented and shown by the plat of said Burgess, Zollinger, and Kamm's addition, until it passed the corner of the land of Mrs. E. Rudisill, as shown on said plat, where the same diverged in a southerly direction to the feeder of the Wabash and Erie canal, but the precise bearing and direction of which is unknown to your orator, and many of the lots in said addition are intersected by said line, the deed from said Rudisill to said Burgess, Zollinger, and Kamm conveying other land south of said 79 Bloomingdale road, and said addition also extending south of said road.

And your orator further shows that the said John J. Kamm died intestate on or about the — day of ——, 187–, leaving the said Hanna Kamm, his widow, and the said Andrew Kamm, George

Kamm, Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm, his children and only heirs-at-laws. And your orator further shows that the said Burgess, Zollinger, and Kamm have divided the lots in their said addition, or some part thereof, amongst themselves, but in what manner your orator is not informed. And the said Oscar Simons and John H. Bass claim to have purchased and now own a considerable part of the 13 acres thus mortgaged by said Rudisill to the said John H. Barnett, but what particular part your orator does not know. And the said Alfred Hattersley, Andrew C. Hoffmeister, and the said Mary J. McCurdy claim to have purchased or have some interest in some of the lots in said addition, all of which claims are inferior to your orator's claim upon said property.

And your orator further represents that the said Henry J Rudisill, after the execution of the said mortgage to the said Abraham G. Barnett upon said mill and mill site, sold and conveyed the undivided half of said mill and the land connected therewith
80 to the said John E. Hill, subject to the mortgage so executed
by said Rudisill to said Abraham G. Barnett.

And your orator further represents that by the terms and conditions of the said several bonds so executed by the said John H. Barnett and Abraham G. Barnett, and the said trust deed to secure the payment thereof, it was expressly agreed that if default should be made in the payment of any installment of interest upon any of said bonds at the time specified in said coupons and the same should remain due and unpaid for thirty days after said interest should become due, then the principal sum in each of said bonds mentioned, with all the arrearages of interest thereon, should at the option of the legal holder of said bonds, or either of them, thereupon become due and might be collected immediately thereafter.

And your orator avers that the semi-annual interest coupon No. 19 to each of said bonds for the sum of $45 each, making the sum of $360.00, became due and payable on the 15th day of January, 1879, and more than thirty days have elapsed since the same became due, and said defendants have wholly failed and neglected to pay the same or any part thereof, and the same remains wholly unpaid.

And your orator avers that the holders of said bonds have exercised the option conferred upon them and declared the whole of said principal sum of $8,000.00, with the interest accrued thereon,
81 has become due and payable to your orator as such trustee,
and there is now due to your orator as such trustee the sum of $360.00, as stipulated in said interest coupons No. 19, with 6 per cent. interest thereon from the 15th day of January, 1879, and the further principal sum of $8,000.00, with nine per cent. interest thereon from said 15th day of January, 1879, together with one-fifth of one per cent. on the whole sum so due, for exchange on said city of Hartford, which your orator avers is the usual and reasonable rate of exchange on said city of Hartford, and the further sum of $375.00 for his solicitors' fees for the collection of said debt, which he avers is a reasonable sum therefor.

To the end, therefore, that said defendants may upon their seveveral and respective corporal oaths full, true, direct, and perfect answers to make to all the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they and each of them thereunto distinctly interrogated, and that the said Henry Burgess and Charles A. Zollinger may answer and set forth specifically what part of the said Burgess, Zollinger, and Kamm's addition is included within the boundaries of the mortgage given by said Rudisill to said John H. Barnett, giving the No. of each lot and part of lot included within said bounds; and
that an account may be taken by and under the direction
82 of this honorable court of what is due and owing to your
orator for principal, interest, exchange, and solicitors' fees on the said mortgage so executed by the said John H. Barnett, and that an account may also be taken in like manner of what is due by the said Henry J. Rudisill for principal, interest, exchange, and solicitors' fees upon his said bond and mortgages, and that said defendants may be severally decreed to pay to your orator the several sums so found due by them by a short day to be appointed for that purpose, or that in default thereof the said defendants, and each of them, may be absolutely debarred and foreclosed of and from all right, claim, lien, and equity of redemption to, upon, or in the premises so mortgaged to your orator by the said John H. Barnett, deceased, *to your orator*, and also the premises so mortgaged by the said Henry J. Rudisill to the said John H. Barnett, deceased, and that the said last-mentioned mortgaged premises, to wit, all that portion of the fractional southeast quarter of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, bounded on the east by the St. Joseph's river, on the south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman, may be decreed to be first sold by
the description contained in said mortgage according to law
83 and the rules of this honorable court, and the proceeds of said
sale be first applied in payment of so much of the costs of this suit as should be properly chargeable to the said Henry J. Rudisill, and the residue be applied on the said sum so found due by the said Henry J. Rudisill, and that the premises described in said mortgage so executed by the said James H. Barnett, to wit, all of lot numbered one hundred and five (105), on the original plat of the town of Fort Wayne, except a strip off of the east side of said lot ten feet in width, running from front to rear thereof, and also part of lot numbered one hundred and six (106), on the same plat, commencing at a point on the east line of said lot thirty feet south of the northeast corner thereof; thence running south along said line twenty feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty feet; thence east at right angles therewith to the place of beginning, may be in like manner *be* sold to make whatever may remain of the sum so found due on said original mortgage security after applying the proceeds of the sale of the said Rudisill land as aforesaid. But if this honorable court should be of the opinion that the release so entered upon the margin of the

record of the mortgage so executed by said Rudisill to the said John H. Barnett is valid, and that the said Henry Burgess, Charles A. Zollinger, and John J. Kamm took the land
84 so conveyed to them discharged from the lien of said mortgage, then your orator prays that the said lot known as the mill lot and bounded on the east by the St. Joseph's road, on the north by the Eckert's addition to the city of Fort Wayne, and on the west and south by alleys as shown on the recorded plat of said Burgess, Zollinger, and Kamm's addition, may be sold and the proceeds thereof applied in payment of so much of the sum so found due by the said Rudisill, and that an account may be taken of what is now due to the said Elizabeth Rudisill for her unpaid annuity, and that said mortgage so executed by the said Rudisill and wife to the said Abraham G. Barnett for the tract of land known as the St. Jo mill property be also foreclosed, and that said land, as described in said mortgage, may in like manner be sold, subject to the said mortgage to the said Elizabeth Rudisill or what may hereafter accrue thereon, and that out of the proceeds of said sale the said Elizabeth Rudisill may be paid what may so be found due to her, and that the residue thereof be applied, so far—applicable thereto, to the payment of the sum found due by the said Henry Rudisill, and his portion of the costs of this suit, and that your orator may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

85 And may it please your honors to grant unto your orator the writ of subpœna, to be directed to said defendants, Abraham G. Barnett, Nancy Catharine Barnett, a minor; Susan M. Barnett, a minor; Byron H. Barnett, a minor; William Barnett, a minor; Susan B. Shoaff, John A. Shoaff, John E. Hill, Henry Burgess, Charles A. Zollinger, Hanna Kamm, Andrew Kamm, George Kamm, a minor; Charles Kamm, a minor; Henry Kamm, a minor; Anna Kamm, a minor; Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar Simons, and John H. Bass, commanding them and each of them to personally be and appear before your honors in this honorable court to answer all and singular the premises, and perform and abide by such order and decree therein as to your honors shall seem meet.

COOMBS, MORRIS & BELL,
Sol's for Compl't.

Exhibit "A"

(Is the same as Exhibit "A" filed with original bill, and will be found on page 18 of this transcript.)

Exhibit "B"

(Is the same as Exhibit "B" filed with original bill, and will be found on page 20 of this transcript.)

Exhibit "C"

(Is the same as Exhibit "C" filed with original bill, and will be found on page 29 of this transcript.)

EXHIBIT "D"

(Is the same as Exhibit "D" filed with original bill, and will be found on page 30 of this transcript.)

87

EXHIBIT "E"

(Is the same as Exhibit "F" filed with original bill, and will be found on page 33 of this transcript.)

EXHIBIT "A A"

(Is the same as Exhibit "A A" filed with amendment to original bill, and will be found on page 51 of this transcript.)

(Here follows diagram marked p. 86.)

And afterwards, to wit, at the November term of said court, on the 2nd day of March, A. D. 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by his solicitor, and refiles his demurrer to to the bill herein in the words following:

In the Circuit Court of the United States of America in and [for] the District of Indiana. In Chancery.

GEORGE P. BISSELL

vs.

ABRAHAM G. BARNETT, NANCY CATHARINE BARNETT, SUSAN M. Barnett, Byron Heuston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, Oscar Simons, John H. Bass, Mary Ann Wall, Watson Wall, Henry Rudisill, and Elizabeth Rudisill.

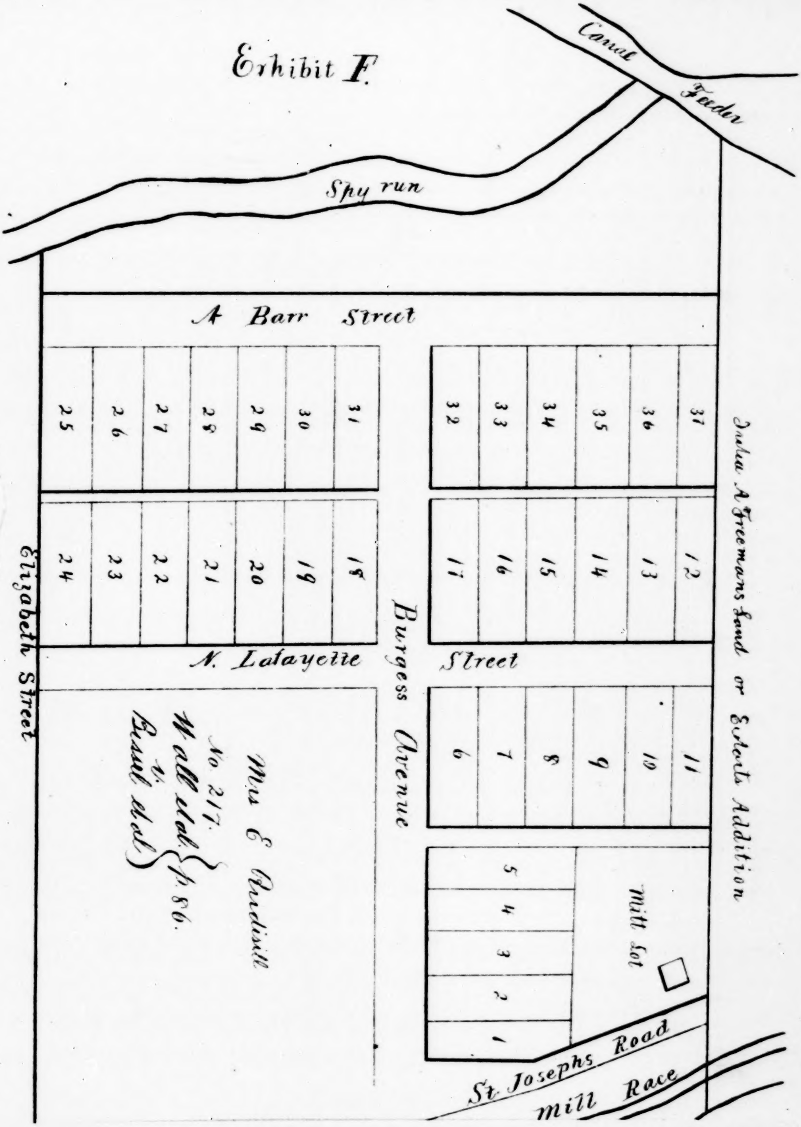
The joint and several demurrer of Henry Burgess, Hannah Kamm, and Andrew Kamm, three of the defendants, to the amended
88 bill of complaint of George P. Bissell:

Said defendants, Henry Burgess, Hannah Kamm, and Andrew Kamm, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's amended bill to be true as therein alleged, demur thereto, and show for causes of demurrer—

1st. That the said complainant hath not in and by his said amended bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against any one or all of these defendants.

2nd. That, as appears from the allegations and statements contained in said amended bill, this court has no jurisdiction to hear and determine any of the matters and things in said amended bill alleged as against these defendants or any one of them.

Exhibit F.



Mrs E Rudisill
No. 217.
Wall et al.
v.
Beall et al } p. 86.

and determine any of
alleged as against these defendants or any one of them.

3rd. That it appears by the said amended bill that the same is exhibited by the said complainant against these defendants and twenty-four others as defendants thereto, for several distinct matters and causes, in several of which, as appears by the said amended bill, these defendants or any of them are in no way interested, which several matters are distinct and independent causes of action having no relation to each other, whereby the proceedings in this suit will become extremely and unnecessarily complicated, and these defendants put to unnecessary charges and expenses in matters which in no way relate to or concern them.

89 4th. That it appears by the said amended bill that it is necessary that the estate of John H. Barnett, deceased, therein named, brother of and joint obligor with the defendant, A. G. Barnett, on the eight $1,000 bonds, for the collection of which this suit is instituted, should be represented in this suit; but no legal representative of the said John H. Barnett's estate is named or made a party thereto.

Wherefore and for divers other errors, imperfections, and good causes of demurrer these defendants, respectively, demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said amended bill, or any of the matters or things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

JENISON & ALDEN,
Solicitors for Defendants, Henry Burgess,
Hannah Kamm, & Andrew Kamm.

I hereby certify that, in my opinion, the foregoing demurrer is well taken in law.

S. R. ALDEN.

And afterwards, to wit, at the May term of said court, on the 28th day of May, A. D. 1880, before the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, and Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

90 Come now the defendants, John Shoaff and Susan B. Shoaff, by Ninde & Ellison, their solicitors, and enter appearance herein.

And afterwards, to wit, at the May term of said court, on the 11th day of June, A. D. 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and the defendants, Oscar A. Simons and John H. Bass, file their cross-bill against the plaintiff and their codefendants, in these words:

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* HENRY J. RUDISELL *et al.*

The cross-complaint of Oscar A. Simons and John H. Bass, two of the defendants, against the complainant, George P. Bissell, and the defendants, Henry J. Rudisill, Elizabeth E. Rudisill, his wife; Elizabeth Rudisill, John E. Hill, Abraham G. Barnett, Byron Huston Barnett, James William Barnett, Mary Ann Wall, Susah B. Shoaff.

The said Oscar A. Simons and John H. Bass, the cross-complainants aforesaid, complaining of the complainant, George P. Bissell, and their codefendants aforesaid, show to the court that on the 30th day of October, 1860, the defendants, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, conveyed by mortgage deed to the defendant, Elizabeth Rudisill, the following-described lands situate 91 in the county of Allen and State of Indiana, to wit: "The south half of the northeast quarter, containing fifty-seven and $\frac{36}{100}$ acres (57.36), the north half of the southeast quarter, containing fifty-eight and $\frac{12}{100}$ acres, and the southeast fraction, containing twenty and $\frac{22}{100}$ (20.22) acres, all in section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, saving and excepting therefrom all that part of said premises lying south of a lane running westerly from the mill thereon, and west of the Saint Joseph State road as now travelled, supposed to contain about seven (7) acres, and also saving and excepting therefrom that portion of said premises heretofore sold and conveyed to Henry C. Gray, Maria C. French, and Julia A. Freeman," which said mortgage deed contained therein written a condition reciting that said Henry J. Rudisill had covenanted and agreed, and did thereby covenant and agree, with said Elizabeth Rudisill to pay to her or her assigns the sum of eight hundred dollars per annum for and during the full term of her natural life, payable as follows, to wit, two hundred dollars on the first days of January, April, July, and October of each and every year, and providing that if he, the said Henry J. Rudisill, his heirs and assigns, should pay or cause to be paid said sums of money at the times aforesaid, then the said conveyance should be void; of which said mortgage deed a copy is filed herewith marked "Exhibit A," which said cross-complainants pray may be taken as part of this their cross-bill.

92 And the said cross-complainants show to the court further that said mortgage was duly recorded in the office of the recorder of said county of Allen on the 7th day of January, 1861, (vol. 7, p. 500); that since the execution thereof, and before the commencement of this suit, the said Henry J. Rudisill and wife conveyed to the defendant, John E. Hill, the undivided half of a portion of the lands described therein, to wit, "commencing where the centre line of Spy Run avenue as now located intersects the north line of Wells' pre-emption in township 31 of range 12 east; thence northwesterly along the centre of said avenue 350 feet to a stake; thence westerly 126 feet to a stake on the centre line of Burgess avenue and 25 feet east of the east end thereof; thence northeasterly

187 feet to a point where the centre line of Spy Run avenue would intersect the north line of the alley in Burgess, Zollinger, & Kamm's addition extended east to the centre of said road; thence west along the north line of said alley 235 feet to the east line of an alley in said addition, running north and south in said addition; thence north along the east line of said alley to the south line of a tract of land sold by Henry Rudisill and wife to Julia A. Freeman; thence east along said south line to the centre of Spy Run avenue; thence northeasterly with the centre of said avenue to the southeast corner of a three-acre tract of land sold by Henry Johns to Henry Gray on the west bank of the St. Joseph river; thence along the bank of said river with the 93 meanders thereof to the south line of the north half of the N. E. ¼ of section 35, township and range aforesaid; thence northeasterly across the river to the north corner of that portion of said section 35 east of the St. Joseph river; thence southerly along the bank of said St. Joseph river with the meanders thereof to the southwest corner of a tract of land sold by H. J. Rudisill to Nicholas Hubertus and wife; thence southeast to the east quarter-post of said section 35; thence along the east line of said section 35 3 chains and 46 links; thence S. 24° E. six (6) chains and ten (10) links; thence S. 65° E. eleven (11) chains and fifty (50) links; thence S. 12½° W. one (1) chain and forty-five (45) links to the St. Joseph river; thence westerly with said St. Joseph river to the intersection of its northwest bank with the north line of said Wells pre-emption; thence west along said north line to the place of beginning, containing thirteen (13) acres more or less;" and that the defendant, Elizabeth Rudisill, since the commencement of this suit, to wit, on the 29th day of October, 1879, sold and assigned to these cross-complainants the mortgage made by said Henry J. Rudisill and wife to her, and the obligation of said Henry J. Rudisill therein contained, and *and* all her right, title, and interest in and to all the sums of money secured thereby which should become due thereafter, and also all sums of money secured thereby which had theretofore accrued and become payable and were then unpaid, and all interest due thereon.

94 And said cross-complainants show to the court further that there is due and unpaid upon the obligation of said Henry J. Rudisill in said mortgage contained and thereby secured for unpaid installments and interest accrued thereon six thousand dollars; that the said Elizabeth Rudisill is a woman of robust constitution and good health with an expectation of life of ten years. and that the present value of an annuity of $800 annually during her natural life is six thousand dollars.

And said cross-complainants show to the court further that after the execution of said mortgage, to wit, on the 14th day of January, 1869, the said Elizabeth Rudisill released and discharged said mortgage as to all the lands described in it lying west of the St. Joseph feeder to the Wabash and Erie canal, leaving it in force as to all the said lands lying east of said feeder.

And said cross-complainants show to the court further that after-

wards, to wit, on the — day of ——, George P. Bissell & Co. loaned to John H. Barnett and Abraham G. Barnett eight thousand dollars, and to secure the same took from said Barnetts their eight coupon bonds, due in — years from date, and a deed of trust in the nature of a mortgage executed by said J. H. Barnett to said George P. Bissell in trust for the holders of said bonds: that afterwards said J. H. and A. G. Barnett loaned and advanced five thousand dollars of the money so borrowed to one Newton B. Freeman; that to indemnify and secure said Barnetts in the
95 repayment of the sum so advanced to said Freeman said Henry J. Rudisill, on the 15th day of July, 1869, executed to said John H. Barnett a bond in the penal sum of ten thousand dollars, conditioned for the payment of said sum of five thousand dollars and the interest thereon; that afterwards, to wit, on the 13th day of December, 1871, said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, executed to said John H. Barnett a mortgage to secure said bond, conveying to him part of the same lands described in said mortgage to Elizabeth Rudsill; that afterwards, to wit, on the — day of February, 1872, said John H. Barnett died testate, and by his last will, which was duly admitted to probate, appointed said Abraham G. Barnett his executor and trustee of all his estate, real and personal; that said Abraham G. Barnett, as expressly authorized by the terms of said will, took upon himself in good faith the administration of said estate and the execution of the trusts created by said will, without oath, bond, or letters testamentary, and so acted and was recognized by all persons concerned in said estate.

And said cross-complainants show to the court further that afterwards, to wit, on the 23rd day of January, 1875, said Henry J. Rudisill sold to Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm part of the lands described in the mortgage previously executed by him, as aforesaid, to John H. Barnett: that prior to any con-
96 veyance of the lands so sold, and for the purpose of enabling him to convey a clear title thereto, said Abraham G. Barnett, acting, as aforesaid, as executor and trustee of the estate of said John H. Barnett, executed, upon the record of the mortgage made by said Rudisill to said John H. Barnett, as aforesaid, a release of said mortgage as to the lands so sold to said Burgess, Zollinger, and Kamm, as aforesaid; and on the same day the said Henry J. Rudisill and his wife, in consideration of said release, and as a substituted security in the place of said mortgage, so far as the same had been released, executed to said Abraham G. Barnett another mortgage, to secure the same bond aforesaid, conveying another portion of the same lands described in said mortgage given to said Elizabeth Rudisill, as aforesaid.

And said cross-complainants show to the court further that afterwards, to wit, on the 23rd day of January, 1875, the said Elizabeth Rudisill, voluntarily and without any consideration, executed upon the margin of the record of the mortgage executed to her by Henry J. Rudisill, as aforesaid, a writing in the words and figures following, to wit: "I hereby release any and all liens by reason of this mortgage of the premises therein described, — the following, viz:

That part of the S. E. ¼ fr. quarter of sec. 35, t'p 31, R. 12 E., conveyed by Henry J. Rudisill to Messrs. Henry Burgess, Chas. A. Zollinger, Jno. J. Kamm, by deed dated July 23, 1875. Witness my hand and seal this 23 day of Jan., 1875. Elizabeth Rudisill."

97 And said cross-complainants say that said Henry J. Rudisill did not execute any conveyance to said Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm, dated 23 July, 1875, of any lands whatever, and furthermore that said writing was not acknowledged before or attested by the recorder of said county, as is required by law in the execution of a release of record, wherefore these cross-complainants say that said writing was, for want of form, description, consideration, and attestation, void and of no effect as a release.

And said cross-complainants show to the court further that on the 28th day of February, 1879, the complainant, George P. Bissell, filed in this court his bill of complaint, and on the 4th day of February, 1880, following his amended bill making defendants thereto these cross-complainants, and said Abraham G. Barnett, Henry J. Rudisill, Elizabeth E. Rudisill, his wife; Elizabeth Rudisill, John E. Hill, Byron Huston Barnett, James William Barnett, Mary A. Wall, Watson Wall, Susan B. Shoaff, John A. Shoaff, Henry Burgess, the heirs of Jacob J. Kamm, deceased, and others, in which bill and amended bill were set up the said coupon bonds and the mortgage made to secure them, and said bond executed by Henry J. Rudisill to John H. Barnett and the said mortgage made to secure it and the release thereof, and said subsequent mortgage executed by said Henry J. Rudisill to said Abraham G. Barnett, with descriptions
98 of all said lands and copies of all said bonds and mortgages, and the will of said John H. Barnett, together with many other matters not material to be enumerated here, all which will fully appear by reference to said amended bill and the exhibits filed therewith, to all which reference is hereby made.

And said cross-complainants show to the court further that the said complainant claims in his said amended bill that the release of the said mortgage executed by said Henry J. Rudisill to John H. Barnett which was executed on the record of said mortgage by said A. G. Barnett was void, and that at the same time the said writing executed by said Elizabeth Rudisill on the margin of the record of her mortgage as aforesaid was a valid release, and that he is entitled to foreclose said mortgage so executed to said John H. Barnett as a first lien on the lands described in it for the payment of five-eighths of the money due on said coupon bonds, and also to foreclose said subsequent mortgage executed to said Abraham G. Barnett, all which he is seeking to do in this cause, and in which the said Barnetts, Walls, and Shoaffs are aiding and assisting him.

And said cross-complainants say that the writing executed by the said Elizabeth Rudisill on the margin of the record of her mortgage as aforesaid was wholly void and of no force as a release, and that all the lands described in said mortgage which lie east of
99 the feeder to the Wabash and Erie canal are and ought to be subject to the lien of said mortgage; and, further, if the

said release executed by said Abraham G. Barnett upon the margin of the mortgage executed by Henry J. Rudisill to John H. Barnett as aforesaid was void, then the said mortgage executed in consideration thereof as aforesaid was void and of no effect in the hands of said A. G. Barnett and cannot be foreclosed in his favor or in favor of the complainant herein.

Said cross-complainants show to the court further that there are situated on the lands described in said mortgage executed by said Henry J. Rudisill to Elizabeth Rudisill a mill-dam, race, and flouring mill of large value, and together constituting the chief value of the property covered by said mortgage; that said dam, race, and mill are out of repair and in imminent danger of destruction by the water of the St. Joseph river unless such steps as shall be necessary to their protection shall be taken at once; that in the present situation of the title to said property no one interested in it will, or can afford to, advance the money to make the repairs necessary to save the property from danger, except under the authority of this court, and that these cross-complainants are willing to advance to a receiver to be appointed by this court whatever money may be
necessary to make such repairs as will secure said dam, race,
100 and mill from immediate danger upon an order that the
same shall stand as a first lien on the property for whose
benefit it shall be expended.

Wherefore said cross-complainants pray that an account may be taken of the amounts due and unpaid upon the obligation of said Henry J. Rudisill contained in his said mortgage to Elizabeth Rudisill, which was assigned to these cross-complainants as aforesaid; and that the court shall also ascertain and fix by the decree in this cause the present money value of an annuity of eight hundred dollars per annum, payable in installments of two hundred dollars each on the first days of January, April, July, and October in each year during the natural life of said Elizabeth Rudisill; and that the said Henry J. Rudisill and John E. Hill, Jr., may be required to pay to these cross-complainants at an early day to be fixed by the court the amount found due and unpaid upon over-due installments of the annuity provided by said mortgage, and also the amount found by the court to be the present value of said annuity in cash; and that it may be ordered by the court that upon failure of said Henry J. Rudisill and John E. Hill, Jr., to make such payments, that all the lands described in said mortgage which lie east of the St. Joseph feeder to the Wabash and Erie canal may be sold under
the order of the court as lands are sold upon executions at
101 law, and the proceeds of such sale applied to the payment
of the sum found due these cross-complainants; and that
upon such sale all equity of redemption of all the parties hereto may be forever barred and foreclosed.

And said cross-complainants pray further that it may be decreed by the court that said mortgage executed on the 23rd day of January, 1875, by Henry J. Rudisill and wife to Abraham G. Barnett, hereinbefore referred to, was without consideration and void, and that the same may be cancelled and set aside; or if the court shall be of opinion that said mortgage was not void, then said cross-complainants pray that the court may take an account of the amount due thereon, and decree that in case said mortgaged property shall be sold for the satisfaction of the sum found due the cross-complainants, the same shall be for the satisfaction of the sum found due on said mortgage to Abraham G. Barnett, and that the lien of these cross-compainants shall be decreed by the court to be the prior lien, and to be first paid out of the proceeds of said sale.

And said cross-complainants pray further that a receiver may be appointed by this court to take possession of said mortgaged premises, and under the order of the court make such temporary repairs of the mill-dam, race, and flouring mill situate thereon as shall protect the same against injury from the water of the St. Joseph 102 river, the cost of such repairs to be made a charge on the property in favor of these cross-complainants to the extent of the money furnished by them to such receiver and expended thereon; and said cross-complainants also pray for all other proper relief necessary for the protection of their rights and the full accomplishment of justice.

OSCAR A. SIMONS,
JOHN H. BASS,
By TAYLOR & MORRIS,
Solicitors.

STATE OF INDIANA, *Allen County:*

Robert S. Taylor, being duly sworn, on his oath says that he is personally acquainted with the facts stated in the foregoing cross-bill touching the situation of the mill-dam, race, and flouring mill situated on the mortgaged premises, having examined the same within the last three days; that all the facts stated in the cross-bill on that subject are true.

R. S. TAYLOR.

Subscribed and sworn to before me this 10th day of June, 1880.
NOBLE C. BUTLER, *Clerk.*

"EXHIBIT A."

This indenture made this thirtieth (30th) day of October, A. D. 1860, by and between Henry J. Rudisill and Elizabeth E. Rudisill, of Allen county, Indiana, of the one part, and Elizabeth Rudisill, of Allen county, Indiana, of the other part, witnesseth:

That in consideration of the covenants, promises, and agreements of the said Henry J. Rudisill hereinafter contained, and in 103 further consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, have bargained and sold, and by these presents do grant and convey, to the said Elizabeth Rudisill, and to her heirs and assigns, forever, the following premises situate in Allen county, Indiana, to wit: The south half of the northeast quarter, containing fifty-seven and $\frac{36}{100}$ (57.36) acres; the north half of the southeast quarter, containing fifty-eight and $\frac{12}{100}$ (58.12) acres, and the southeast fraction, containing twenty and $\frac{22}{100}$ (20.22) acres, all in section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, saving and excepting therefrom all that part of said premises lying south of a lane running westerly from the mill thereon, and west of the Saint Joseph State road as now traveled, supposed to contain about seven (7) acres, and also saving and excepting therefrom that portion of said premises heretofore sold and conveyed to Henry C. Gray, Maria C. French, and Julia A. Freeman; to have and to hold the premises above described to the said Elizabeth Rudisill, and to her heirs and assigns, forever, together with all and singular the appurtenances thereunto belonging or in anywise appertaining, to her own proper use, benefit, and behoof: Provided always, nevertheless, and these presents are made upon this express condition, That whereas, in consideration of the conveyance of the above-described 104 premises, this day made by the said Elizabeth Rudisill to the said Henry J. Rudisill, the said Henry J. Rudisill has covenanted, agreed, and promised, and by these presents does hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said Elizabeth Rudisill and her assigns to pay to the said Elizabeth Rudisill, or to her assigns, the sum of eight hundred dollars ($800) per annum for and during the full term of her natural life, in manner following—that is to say, two hundred dollars ($200) on the first days of January, April, July, and October of each and every year during the term aforesaid. Now, should the said Henry J. Rudisill, his heirs, executors, administrators, and assigns, pay or cause to be paid to the said Elizabeth Rudisill, or to her assigns, the sums of money aforesaid, at the times and in the manner aforesaid, and without any relief from valuation or appraisement laws, then and in that case these presents and all the estate hereby granted shall cease and be void, anything herein contained to the contrary in anywise notwithstanding.

In witness whereof the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, have hereunto set their hands and seals the day and year first above written.

HENRY J. RUDISILL. [SEAL.]
ELIZABETH E. RUDISILL. [SEAL.]

STATE OF INDIANA, } ss:
Allen County, }

105 Personally came before me, a notary public in and for said county, the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, and acknowledged the execution of the above and foregoing instrument for the uses and purposes therein set forth.

Given under my hand and official seal this 30th day of October 1860.

W. H. WITHERS. [SEAL.]
Notary Public.

And the court, upon consideration of said cross-bill and the proofs submitted by the parties respectively in reference to the prayer of

said cross-bill for the appointment of a receiver, do order that George H. Wilson be appointed receiver in this behalf and that he shall as such receiver take possession of the real estate described in said cross-bill as the Rudisiil mills property, and with such funds as shall be furnished to him for that purpose by the defendants, Simons and Bass, make at once such repairs upon the dam, race, and mill in said cross-bill described as shall, in his judgment, be reasonably necessary to protect the same against danger of immediate injury from the water of the St. Joe river; that he keep accurate account of all expenditures made by him and report the same to the court, the said expenditures to be charged to the said mill property alone, under such further order as the court shall make hereafter, but no part of the expense of such receivership or the expenditures made by said receiver shall in any event be charged upon any of the property affected by the proceedings in this cause, except
106 said mill property.

And it is further ordered that said receiver give bond for the faithful performance of his duty in the sum of two thousand dollars; and thereupon said George H. Wilson accepts said trust and files his bond, with Stephen B. Bond as surety, which bond is approved by the court; and all other matters in said cause *is* reserved.

(The foregoing proceedings were had and order made on the 10th day of June, 1880, and, having been inadvertently omitted to be entered then, are entered now for then.)

And afterwards, to wit, at the May term of said court, on the 14th day of June, A. D. 1880, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by his solicitors, and, on his motion, it is hereby ordered by the court that L. M. Ninde, an attorney of this court, be, and he is hereby, appointed guardian *ad litem* of the infant defendants, Nancy Barnett, Byron H. Barnett, and James W. Barnett, and said guardian now files answer herein in the words following, to wit:

The answer of Byron Huston Barnett and James William Barnett, by L. M. Ninde, their guardian *ad litem*, implead with others at the suit of George P. Bissell, trustee.

The said defendants, Byron Hueston Barnett and James William Barnett, by their guardian *ad litem*, say that they are ignorant
107 of most of the matters stated in the plaintiff's bill of complaint, and ask*s* the court to require full proof of the plaintiff of all said allegations as may be found in said bill unfavorable to their interests, and that the court will in all things protect their interests in the said cause the same as if all proper averments were made by them in defence of said bill of complaint and such averments duly supported by proofs.

And these defendants, by their said guardian, further answering, say that if the court shall find and decree that the plaintiff has in any way estopped himself from prosecuting and foreclosing said mortgage in said bill set forth as executed by said Henry J. Rudisill and Elizabeth Rudisill, his wife, or if the court shall find and decree that the plaintiff has in any manner whatever ratified the pretended release thereof set forth in said bill, or accepted said mortgage so executed to said A. G. Barnett in such manner as to confirm such release, so far as the plaintiff is concerned, then these defendants ask that such acts of the plaintiff may be held to prejudice him alone, and that his recovery on the mortgage so executed to him by said John H. Barnett, deceased, be foreclosed only for three thousand dollars of said mortgage debt and the interest thereon, and that the plaintiff be enjoined from prosecuting said last-named mortgage to recover any further portion of said sum sued for.

And these defendants, by said guardian, aver that said 108 premises so mortgaged by said Rudisill to said John H. Barnett, deceased, were and are of ample value and security for said $5,000 so borrowed by said John H. Barnett for said Rudisill, and as to said sum said John H. Barnett was only surety in equity for said Henry J. Rudisill, and that the plaintiff held such mortgage so executed by said Rudisill by subrogation, and that the same was and is collateral security to protect and indemnify these defendants and their said interests in lots 105 and 106, and to save the same harmless from said mortgage so executed to the plaintiff by said John H. Barnett.

Wherefore these defendants ask to be dismissed with their reasonable costs as to the sum of $5,000, part of the debt sued for, and the interest and costs arising thereon, and from said suit in the prosecution thereof. And as to all such matters these defendants ask the protection of this honorable court.

BYRON HUESTON BARNETT,
JAMES WILLIAM BARNETT,
By L. M. NINDE, *Guardian ad Litem.*

And at the same time, upon motion of complainant, the defendants, John E. Hill and Charles A. Zollinger, are now three times called and come not, but herein wholly make default. And thereupon it is shown to the satisfaction of the court, by the marshal's return to the writ of subpœna, that the above-named defendants were duly served with process herein more than twenty days 109 prior to the first Monday of April, 1880, but have failed to appear, plead, answer, or demur to said bill of complaint. It is therefore considered by the court that the matters and things in said bill alleged as to said defendants above defaulted be taken as confessed and true.

And afterwards, to wit, at the November term of said court, on the 18th day of January, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the complainant, by his solicitors, and files his replication to the answer herein in the words following, to wit:

Circuit Court of the United States, District of Indiana.

The replication of George P. Bissell, complainant, to the answer of John H. Bass — Oscar Simons, defendants, and also to the answer of Henry Burgess, defendant.

This replicant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereto saith that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this replicant, without this, that any other matter or thing whatsoever in said answers contained material or effectual in law to be replied unto,
110 confessed or avoided, traversed or denied, is true; all which matters and things this replicant is and will be ready to aver and prove as this honorable court shall direct, and prays as in his said bill he hath already prayed.

COOMBS, MORRIS & BELL,
Solicitors for Complainant.

And afterwards, to wit, at the November term of said court, on the 27th day of January, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective solicitors, and thereupon the defendants, Henry Burgess *et al.*, by agreement of parties, withdraw their demurrer to the bill of complaint herein, and the defendants, Oscar Simons and John H. Bass, by Mess. Taylor & Morris, their solicitors, file their answer herein in the words following, to wit:

In the Circuit Court of the United States, District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* HENRY J. RUDISILL *et al.*

The joint answer of Oscar A. Simons and John H. Bass, two of the defendants in said cause, to the plaintiff's amended bill of complaint.

The said defendants, by protestation reserving to themselves all lawful exceptions to the said amended bill of complaint for its manifest defects, uncertainties, and insufficiencies, nevertheless,
111 for answer to the same and so much thereof as they are advised is material for them to answer, say that they admit that the said George P. Bissell loaned and advanced to the said Abraham G. Barnett and John H. Barnett the sum of eight thousand dollars at the time stated in the complaint, and that said Abraham G. and John H. Barnett executed to said George P. Bissell & Co. therefor the eight coupon bonds for one thousand dollars each in the complaint mentioned, and that said John H. Barnett executed to the plaintiff to secure said bonds the trust deed in the complaint mentioned, and that the copies of said bonds and trust deed filed

with said complaint are correct copies, and also that said Henry J. Rudisill executed to said John H. Barnett the bond in the penal sum of ten thousand dollars and the mortgage to said John H. Barnett securing the same mentioned in the complaint, and that the copies exhibited of said bond and mortgage are true copies; but the said defendants, upon information which they believe to be true, deny that any portion of said sum of eight thousand dollars was loaned, paid, or advanced to said Henry J. Rudisill or that he made any agreement with the said George P. Bissell & Co. or the plaintiff to pay or assume the payment of any portion of said money so loaned, or that he executed said bond and mortgage, or either of them, to said John H. Barnett as a further or additional security for the payment of said money to said George P. Bissell & Co. or in any manner for the benefit of said George P. Bissell & Co. or the
112 plaintiff's, and, on the contrary, they aver, upon information which they believe to be true, that it was understood and agreed by and between said Abraham G. Barnett, John H. Barnett, Henry J. Rudisill, and one Newton B. Freeman before and at the time said loan was made that five thousand dollars of the sum so borrowed should be by the said Abraham G. and John H. Barnett reloaned and advanced to said Newton B. Freeman, who was then engaged or about to engage in business as a partner with said Abraham G. and John H. Barnett, and that said Henry J. Rudisill should become surety for said Newton B. Freeman for the repayment of said sum of five thousand dollars to said Abraham G. and John H. Barnett; that when said loan was made five thousand dollars of said sum loaned was by said Abraham G. and John H. Barnett paid and advanced to said Newton B. Freeman; that thereupon and to secure said Abraham G. and John H. Barnett in the payment of said sum by said Newton B. Freeman, and not at all as a security to the plaintiff or to said George P. Bissell & Co., or for any other consideration, said bond was executed by said Henry J. Rudisill to said John H. Barnett.

And said defendants, further answering, say, upon information and belief, that there was an agreement made by the said Henry J. Rudisill at the time he executed said bond that he would execute a mortgage to secure the same upon a tract of land known as the St. Joe mill property, being a parcel of land on the St. Joe river, in said county, containing about 15 acres, and comprising
113 a mill-dam, race, and flouring mill.

And said defendants, further answering, say that *that* they are informed and believe, and so aver the fact to be, that said mortgage was executed by said Henry J. Rudisill to said John H. Barnett nearly two years and a half after the execution and delivery of said bond which it purports to secure and without any new or additional consideration therefor and simply at the request and for the accommodation of said Abraham G. and John H. Barnett, and that it does not embrace the mill property specified in the original agreement of said parties at the time of the execution of said bond, but is on other and different land; and that since the death of said John H. Barnett the said Abraham G. Barnett assigned and delivered said bond and mortgage to the plaintiff, and that the plaintiff now holds the same by virtue of such assignment and delivery and not otherwise.

And said defendants, further answering, say that the lands described in said trust deed, executed by said John H. Barnett to the plaintiff, were, at the time said loan was made, and still are, sufficient in value and will sell for a sufficient sum to pay said coupon bonds, interest, and costs in full, and that the plaintiff has no need for his own security to resort to said bond of Henry J. Rudisill or any mortgage securing the same.

And the said defendants, further answering, say that they admit that the said John H. Barnett died testate on the — day of
114 January, 1872; that by his will he made the several devises
of real estate in the complaint set out, and that said will was duly probated and recorded as stated, and that the copy thereof filed with the complaint is a correct copy; and also that said Henry J. Rudisill on the 23rd day of January, 1875, sold and conveyed to Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm a portion of the lands previously mortgaged by said Henry J. Rudisill to said John H. Barnett as aforesaid, and that the portion so sold is correctly described in the complaint; and also that for the purpose of enabling said Henry J. Rudisill to make said sale and conveyance said Abraham G. Barnett entered upon the margin of the record of the said mortgage executed by said Henry J. Rudisill to said John H. Barnett as aforesaid the release set out in the complaint and in the words therein stated; and also that Abraham G. Barnett was named in the will of said John H. Barnett as executor, but had not prior to the time he entered satisfaction of said mortgage as aforesaid taken out any letters testamentary, or given bond, or taken any oath as such executor; and also that said Henry J. Rudisill and wife at the time of the execution of said release and in consideration thereof executed to said Abraham G. Barnett the mortgage to him mentioned in the complaint, and that the property conveyed by said mortgage is correctly described in the complaint and the copy of said mortgage
115 filed with the complaint a correct one, and also that the
property in said last-named mortgage described was then incumbered by a prior mortgage to Elizabeth Rudisill to secure an annuity of eight hundred dollars per annum, as stated in the complaint; and also that said Burgess, Zollinger, and Kamm laid out the greater part of the lands deeded to them by said Henry J. Rudisill as aforesaid into lots, streets, and alleys, as an addition to the city of Fort Wayne, and recorded the same, as stated in the complaint, and that the copy of said plat filed with the complaint is a true copy. And said defendants, further answering, say that as to the location of said Bloomingdale road, and the lines depending thereon in the description of said premises, they are wholly ignorant and have no information.

And the said defendants, answering further, say that they admit that said John J. Kamm died intestate, leaving as his only heirs his widow and children named in the complaint, and also that these defendants have purchased from said Charles A. Zollinger a portion

of the lands described in said mortgage executed by Henry J. Rudisill and wife to John H. Burnett, the portion so purchased by and conveyed to them, and still belonging to them, being described as follows: Lots seven (7), eight (8), nine (9), ten (10), and eleven (11), and the undivided half of lots thirty-two (32), thirty-three (33),
thirty-four (34), thirty-five (35), thirty-six (36), and thirty-
116 seven (37), in Burgess, Zollinger & Kamm's addition to the
city of Fort Wayne; and also the undivided one fourth of that part not included in said addition of the following-described premises, to wit: Part of the southeast quarter of section thirty-five (35) and part of lot number eight (8) in Wells' pre-emption, all in township thirty-one (31) north, of range twelve (12) east, and more clearly described as follows: Commencing two (2) feet east of the southwest corner of lot number one (1) in Eckert's addition to Fort Wayne in said section thirty-five (35); thence west along the south line of said addition to the water line of the feeder of the Wabash and Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson and Saginaw railroad; thence southeasterly along said right of way to the centre of the Bloomingdale road; thence northeasterly with the centre of said road to its intersection with the north line of Elizabeth street; thence, with the north line of said street, to a point due north of the northwest corner of lot number eleven (11) in Rudisill's subdivision of a part of lot eight (8) of Wells' pre-emption; thence northerly, at right angles to said street, three hundred and forty-three (343) feet; thence easterly, parallel with Elizabeth street, three hundred and eighty-seven (387) feet to the west line of the St. Joseph road; thence northerly along the line of said road two hun-
dred and twelve (212) feet; thence west, parallel with Eliza-
117 beth street, to a point due south of the place of beginning.

And the said defendants, further answering, say that they admit that said Henry J. Rudisill, after the execution of said mortgage above mentioned to Abraham G. Barnett, conveyed the undivided half of said mill and the land connected therewith to the defendant, John E. Hill, subject to said mortgage, but that as to all the averments in said complaint contained in relation to the nonpayment of interest on said coupon bonds and the exercise of their option by the holders thereof to declare the principal of said bonds due they are wholly ignorant and have no information whatever, for want of which knowledge they deny the said averments.

And the said defendants, answering further, upon information which they believe to be true, say that said John H. Barnett was the brother of said Abraham G. Barnett, and was associated with him in business; that said John H. Barnett in his lifetime reposed the greatest trust and confidence in said Abraham G. Barnett, and intrusted him with the principal management of his property and business; that by his said will the said John H. Barnett created and vested in the said Abraham G. Barnett divers extensive powers in trust not appertaining to the office or functions of an executor merely,
but far exceeding them, and vesting in personal trust and
118 confidence, and among them the following: To control the

interests of Catharine, Susan, Byron Huston, and James Wm. Barnett, his children, in the real estate devised to them by the fourth clause of said will, without limitation as to time; to declare and fix the rights and liabilities of the testator as a member of the firm of Freeman & Barnett by such knowledge as he possessed of the terms of the agreement between said partners; to control the interests of James B. and Charles W. Wall in the paper-mill business devised to them by the fifth clause of said will until said James B. Wall should arrive at the age of twenty-five years, and in the meantime to sell the interest of the said Walls in said business, at his discretion as to time, price and terms; to assume and discharge the functions of executor without giving bond or taking out letters testamentary, and as though he had letters testamentary to execute all trusts devolving on him as executor, and also those which should arise incidentally in the execution of his trusts as executor, *and also those which should arise incidentally in in the execution of his trusts as executor;* to collect rents of real estate and have control and disposal of all personal property and effects, and reduce them to availability until such rents and personal assets should be sufficient to pay all
the debts and funeral expenses, and purchase a lot in Linden-
119 wood cemetery, and improve it, and remove to it the remains
of his father and mother, and erect a monument over them.

And said defendants, further answering, say, upon information which they believe to be true, that upon the death of said John H. Barnett, which took place at the county of Allen and State of Indiana, on the — day of February, 1872, said Abraham G. Barnett, believing in good faith that he was entitled by the terms of said will to assume and exercise all the powers and trusts conferred upon him by said will, without the taking of any oath or filing any bond as executor, and without taking out any letters testamentary, did take possession of all the estate of said John H. Barnett, real and personal, and collect and pay debts, and collect and disburse rents, and in all respects deal with all the estate of said John H. Barnett as one having ample and plenary authority; that such assumption by said Abraham G. Barnett of possession of the estate of said John H. Barnett, and such exercise by him of full control and authority over the same as executor and trustee under said will, was with the full knowledge, concurrence, and consent of all the heirs and devisees of said John H. Barnett, and all the debtors and creditors of his estate, and in particular of the plaintiff, who, by his agents at the city of Fort Wayne, recognized and dealt with the said Abraham G. Barnett as the executor and trustee of the estate of said John H. Barnett from the time of his death until long after the said entry of satis-
faction of said mortgage was made as aforesaid; that said
120 Burgess, Zollinger, and Kamm, and said Henry J. Rudisill
were each and all in fact ignorant at the time said entry of satisfaction was made on the record by said Abraham G. Barnett of the mortgage of said Rudisill to said John H. Barnett as aforesaid; that there was, in fact or law, any want or defect of authority on the part of said Abraham G. Barnett to satisfy said mortgage, but believed in good faith, as they justly might, not only from the fact that

said Abraham G. Barnett was in his own person the surviving joint creditor to whom the indebtedness secured by said mortgage was owing by said Newton B. Freeman, and for which indebtedness said mortgage of Rudisill was only secondary and collarteral security, and not only from the extraordinary powers conferred upon said Abraham G. Barnett by the will of said John H. Barnett, but also from the universal and uniform concurrance of all the heirs and devisees of said John H. Barnett, and all his debtors and creditors, including the plaintiff, in the exercise by him of all the powers conferred by said will during the period of three years which had elapsed since the death of said John H. Barnett, and during all which time the said Newton B. Freeman and Abraham G. Barnett had continued to carry on the firm business of said Freeman & Barnett, in which said sum secured by said mortgage was all invested:
that said Abraham G. Barnett had full power and authority
121 to satisfy said mortgage, as he did, and that upon the faith of
such belief, and upon the faith of the satisfaction of said mortgage, made as aforesaid, said Burgess, Zollinger, and Kamm purchased the lands conveyed to them by said Rudisill as aforesaid and paid therefor the full value thereof, to wit, ten thousand dollars in cash.

And said defendants, further answering, say, upon information which they believe to be true, that after the conveyance of said lands to Burgess, Zollinger, and Kamm, as aforesaid, they, the said Burgess, Zollinger, and Kamm, laid out the greater portion thereof into lots, streets, and alleys, as an addition to the city of Fort Wayne, and publicly offered the same for sale, and from time to time sold divers of said lots to innocent purchasers, who bought and paid for, and improved the same without notice of any incumbrance thereon, and believing their title to be clear and unincumbered, all which took place and continued with the knowledge of all the heirs and devisees of said John H. Barnett, and of the plaintiff, by his agents, all of whom stood by and set up no claim of any lien upon said lands or pretence that the entry of satisfaction was not in all respects effectual and valid.

And the said defendants, further answering, say that long after all said transactions, to wit, — years after the death of John H. Barnett, and — years after the satisfaction of said mortgage to him by the said Abraham G. Barnett, as aforesaid, and the conveyance of
said lands on the faith thereof to said Burgess, Zollinger, and
122 Kamm, these defendants, in good faith, and without any
notice in fact of any incumbrance on said lands, or any knowledge that any question would or could be made of the validity of said satisfaction entered by said Abraham G. Barnett as aforesaid, purchased from said Zollinger that portion of said lands conveyed to them by him as aforesaid, and paid him in cash the full value thereof.

And the said defendants, answering further, say, on information which they believe to be true, that after the delivery by said Rudisill to said Abraham G. Barnett of the mortgage executed to him as aforesaid in lieu and stead of the mortgage to said John H. Barnett, which had in consideration thereof been cancelled as aforesaid, the said Abraham G. Barnett, with the knowledge, concurrence, and consent of the heirs and devisees of said John H. Barnett, retained said mortgage in his hands as a valid and subsisting security until the commencement of this suit, when he delivered the same to the plaintiff as a valid mortgage, who accepted the same and brought the same into this court as a valid and subsisting security, and asked a foreclosure of the same, as will more fully appear from the original and supplemental bills of the plaintiff in this cause, now on file in this court, to which reference is hereby made, by means whereof the acts of the said Abraham G. Barnett in the satisfaction of said mortgage by Henry J. Rudisill to John H. Barnett and the 123 acceptance of said mortgage to himself in the place thereof have been ratified by the plaintiff and all the parties in interest.

Wherefore said defendants say that the entry of satisfaction of said mortgage from said Henry J. Rudisill to said John H. Barnett, made as aforesaid, was not void but was valid and effectual in law as an exercise of power vested in him as the surviving joint creditor of said Newton B. Freeman, the principal debtor owing the debt secured by said mortgage, and also of powers conferred on him as executor and trustee under the will of said John H. Barnett; and, further, that if the entry of satisfaction was not in law valid by virtue of the powers vested in said Abraham G. Barnett, yet by the acts and conduct of the heirs and devisees of the said John H. Barnett, and of the plaintiff, hereinbefore stated, the plaintiff is and ought to be estopped to assert against these defendants that said entry of satisfaction was void, or to claim as against these defendants any lien upon the lands conveyed to them as aforesaid.

Wherefore said defendants pray to be dismissed hence without day, and for their costs, and for all other proper relief.

OSCAR A. SIMONS,
JOHN H. BASS,
By TAYLOR & MORRIS,
Their Solicitors.

STATE OF INDIANA, *Allen County:*

124 The said Oscar A. Simons and John H. Bass, being each duly sworn, do upon their several oaths depose and say that they have read the foregoing answer, and that all the facts stated therein as of their own knowledge are true, and that all facts therein stated upon information and belief are stated upon what they believe to be correct and reliable information, and they believe the same to be true.

OSCAR A. SIMONS.
JOHN H. BASS.

Subscribed and sworn to before me this 24th day of January, 1881.

[SEAL.]

N. W. WRIGHT,
Notary Public.

And at the same time the defendants, Henry Burgess, by S. R. Alden, his solicitor, also files his answer herein in the words following, to wit:

In the Circuit Court of the United States in and for the District of Indiana.

The separate answer of Henry Burgess to the original, supplemental, and amended bill of complaint of George P. Bissell.

This defendant, reserving all right of exception to the said original, supplemental, and amended bill of complaint, for answer to so much thereof as he is advised is material or necessary for him to answer, *he* admits the death and intestacy of J. J. Kamm, and his relations to the defendants Kamm herein as alleged in complainant's amended bill, and he also admits the execution and delivery by the defendant, Abraham G. Barnett, and John H. Barnett, his
125 brother, since deceased, on the 15th day of July, 1869, of their eight coupon bonds, in the sum of $1,000.00 each, in terms and substance as appears from the copies thereof filed with complainant's bill as exhibits, and the execution and delivery by said John H. Barnett, deceased, to the complainant on the same day as security for the payment of said bonds of a trust deed of certain of his property, in terms as appears from the copy thereof filed as an exhibit with complainant's bill; and this defendant avers that said real estate so conveyed to said George P. Bissell in trust by said John H. Barnett is worth several thousand dollars more than the entire indebtedness of said John H. and Abraham G. Barnett, as evidenced by said bonds and the unpaid interest coupons thereto attached, and would sell on execution for more than enough to pay said indebtedness with all costs and expenses of collection.

This defendant admits further the death of said John H. Barnett, testate, on the — of January, 1872, the probate and record of his will and testament, of which a copy is filed as an exhibit with complainant's bill, and also the device as appears in said will of certain interest in the property conveyed as aforesaid by John H. Barnett to George P. Bissell to certain of the defendants.

This defendant is not informed, except by complainant's bill, whether or not the said Abraham G. Barnett ever gave bond
126 and qualified under the statutes of this State as executor of said John H. Barnett's estate.

This defendant avers, on information which he believes to be true and reliable, that about the time said George P. Bissell & Co. made said loan of $8,000.00 to said brothers Barnett, there was formed the firm of Freeman & Barnett, in the fifth clause of said will mentioned, consisting of Newton B. Freeman, who then was and still is a resident of the State of Indiana, and said brothers Barnett: that at or about that time the said brothers Barnett purchased the interest of the former partners of said Newton B. Freeman in the paper mill built by said Freeman, and the premises of said Freeman whereon the same was located, and the machinery and business therewith connected, and in accordance with a pre-

vious understanding between said Freeman and themselves loaned him (Freeman) $5,000 of the $8,000 loan made to the said brothers Barnett by the said George P. Bissell & Co., as aforesaid; that Freeman then invested the said $5,000 in said firm's business, except the amount, to this defendant unknown, paid as commission to John Hough for negotiating said $8,000 loan, and said Freeman, not having unincumbered real estate by which to secure the payment of the same to said brothers Barnett, Henry J. Rudisill, one of the defendants and brother-in-law of said Freeman and then supposed to be very wealthy, about that time, or soon thereafter, executed to
said John H. Barnett, for the use and benefit of brothers
127 Barnett, and not for the benefit or security or with the knowl-
edge of said George P. Bissell & Co., to indemnify said brothers Barnett from loss by reason of their said $5,000 loan to their partner in said paper-mill business (Newton B. Freeman) his (Henry J. Rudisill's) bond in the penal sum of $10,000, conditioned to pay said sum of five thousand dollars, with interest, thereon according to the terms of the bonds heretofore mentioned from said brothers Barnett to said George P. Bissell & Co., a copy of which is filed as an exhibit with complainant's bill.

This defendant also avers, on information which he deems reliable and believes to be true, that about two and one-half years thereafter said Abraham G. Barnett, acting on the advice of a friend who was an attorney and knew that said Henry J. Rudisill was becoming involved, persistently importuned said Rudisill to give the mortgage security for said indemnity bond which said Barnett then claimed had been agreed on between them at or about the time said bond was given; that said Rudisill finally yielded to the importunities of said Barnett and executed to John H. Barnett his mortgage deed as theretofore drawn by an agent of said brothers Barnett, conveying to said J. H. Barnett all that portion of the fractional southeast quarter of section thirty-five (35), in township thirty-one north, of range twelve east, in Allen county, Indiana, bounded on the east by the St. Joseph's river, south by the Bloomingdale road; west by the
feeder to the Wabash and Erie canal, and on the north by
128 the lands of Julia A. Freeman, estimated to contain thirteen
acres, and conditioned in words and figures as follows, viz., to secure the payment of the following-described bond, to wit, a bond of even date herewith to secure the payment to George P. Bissell of certain coupon bonds bearing date July 15th, 1869, to the amount of five thousand dollars, as fully recited in said bond given by said mortgagor to said mortgagee, a copy of which mortgage is filed — complainant's bill as exhibited.

This defendant does not know of his own knowledge, but, on credible information which he believes true, avers that prior to the execution of the aforesaid mortgage by said Rudisill to J. H. Barnett said Rudisill had agreed with said brothers Barnett to give a mortgage of his St. Joe mills or mill property to secure said brothers Barnett from loss by reason of the said loan to Newton B. Freeman; and further, on information which he believes to be true, the defendant avers that said Henry J. Rudisill — said $10,000 bond to said

John. H. Barnett as aforesaid solely as accommodation for his brother-in-law, Newton B. Freeman, to indemnify said brothers Barnett from loss by reason of their loan to said Freeman, and on no further consideration; that said Henry J. Rudisill never received any portion of said loan nor any consideration from said Freeman nor any person for the execution of said bond further than above
stated: that said Henry J. Rudisill and wife executed said
129 mortgage without receiving any consideration therefor what-
ever to please said Abraham G. Barnett: and that said Rudisill never paid any attention to said Bissell and Barnett loans, but that said firm of Freeman & Barnett and said Newton B. Freeman personally attended to the payment of interest on said $8,000 loan until the default set forth in complainant's bill.

This defendant further avers, upon information which he believes true, that said Henry J. Rudisill, in the month of January, 1875, for the purpose of paying off and redeeming manifold mortgage, tax, and judgment liens encumbering his real estate sold and by warranty deed duly recorded, in which his wife joined, conveyed to Charles A. Zollinger and J. J. Kamm, for $5,000 cash, one undivided half, and to Henry Burgess, for $5,000 cash, the other undivided half, of the following real estate, situate, lying, and being in the county of Allen, State of Indiana, to wit, a part of the southeast quarter of section thirty-five (35), and a part of lot number eight (8) of Wells' pre-emption, all in township thirty-one (31) north, of range twelve east, more clearly described as follows: Commencing twenty-one feet east of the southwest corner of lot number one in Eckart's addition to the city of Fort Wayne, in said section thirty-five; thence west along the south line of said addition to the water
line of the feeder to the Wabash and Erie canal; thence
130 southwesterly along said feeder to its intersection of the
right of way of the Fort Wayne, Jackson & Saginaw railroad; thence southeasterly along the said right of way to the centre of the Bloomingdale road; thence northeasterly with the centre of said road to its intersection with the north line of Elizabeth street to a point due north of the northeast corner of lot eleven in Rudisill's subdivision of part of lot eight of Wells' pre-emption; thence northerly at right angles to said street three hundred and forty-three feet; thence easterly parallel with said Elizabeth street three hundred and eighty-seven feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning; a copy of which deed this defendant files herewith as part hereof, marked Exhibit A.

He further avers, upon information received from the surveyor who subsequently measured said premises, and which measurement he believes to be correct, that said premises contain nineteen acres within said bound-ry lines.

And he further avers that nearly all said sum of ten thousand dollars was used in paying off liens of various kinds on said property, as was at the time understood by said purchasers, and that,

except an annuity mortgage to Mrs. Elizabeth Rudisill hereinafter
131 mentioned, all encumbrances then appearing of record
and shown in a complete abstract of the title of said premises were, at the time of said purchase, so far as appeared from the records of Allen county, duly and formally released and satisfied.

This defendant avers further, on information which he believes to be true, that said Abraham G. Barnett, acting for himself and in good faith as executor, *de factò* trustee, and agent of the estate of said John H. Barnett, for himself and in behalf of the legatees and devisees of said testator, agreed with said Henry J. Rudisill to release, and did release, said premises purchased as aforesaid from any and all liens by reason of the mortgage heretofore mentioned, executed by said Henry J. Rudisill and wife to John H. Barnett, in consideration of the conveyance by said Henry J. Rudisill and wife by their mortgage deed to him, the said Abraham G. Barnett, for the benefit of himself and his said brother's estate, of the property which it was claimed said Rudisill originally agreed to mortgage for the indemnity of said brothers Barnett as aforesaid, being all that tract of land known as the St. Joe mill property, in section thirty-five, in township thirty-one north, of range twelve east, in the county of Allen and State of Indiana, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption;
thence with the centre of the St. Joe road northerly to a point
132 where the St. Joe turnpike intersects the same; thence easterly
along the centre of said turnpike to the west quarter post of section thirty-six, in said township and range; thence southeasterly with the eastern boundary of said mill site to the bank of the St. Joe river; thence westerly with said river to the place of beginning, containing fifteen acres, more or less, as security for the performance of the conditions of the bond executed as aforesaid by said Henry J. Rudisill as indemnity to said brothers Barnett; and that said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, did execute and deliver to said Abraham G. Barnett, for his and said estate's benefit, as so agreed in consideration of said release, their mortgage deed of said mill property, dated on the 23rd day of January, 1875, conditioned to secure the performance of the conditions of said bond, which mortgage was duly recorded on the 26th day of January, 1875, in the mortgage records of Allen county, on page 564 of volume 26 thereof, a copy of which is filed as part of the complainant's bill and marked Exhibit —; that said Abraham G. Barnett, as evidence of the aforesaid release, made upon the margin of the record of said mortgage executed to J. H. Barnett by said Rudisill the entry of release and satisfaction in words and figures as set forth in complainant's bill about the time of or shortly prior to said purchase by said
Burgess, Zollinger, and Kamm, and that said Burgess, Zollinger,
133 and Kamm were, at the time of the said purchase,
ignorant of the alleged fact that said Abraham G. Barnett had not qualified or given bond under the statutes as executor of the estate of said J. H. Barnett.

This defendant avers that a part of said St. Joe mill property and the premises purchased by Burgess, Zollinger, and Kamm and released as aforesaid by A. G. Barnett were then encumbered by a mortgage duly executed by said Henry J. Rudisill and wife on the 30th day of October, 1860, and recorded at page- 500 & 501 of volume — of the mortgage records of said county on the 7th day of January, 1861, securing an annuity of eight hundred dollars to Elizabeth Rudisill, mother of said Henry J. Rudisill, but that over and above the entire amount of said encumbrances said mill property was worth at the time of said release by Abraham G. Barnett several thousand dollars more than the property so released unencumbered.

This defendant, further answering, admits that the bond executed by said Rudisill to indemnify said brothers, Barnett, was, as alleged in complainant's original bill, assigned to the complainant, and on information, which he believes true, this defendant avers that both said bond and said mortgage of said mill property se-
curing the performance of its conditions were assigned and
134 delivered to the complainant by the said Abraham G. Bar-
nett for the benefit of himself and the devisees and legatees
of said John H. Barnett, deceased, and that complainant holds the same solely by virtue of their assignment and delivery to him by said Abraham G. Barnett for the benefit of himself and said estate, and as to whether the mortgage first executed by said Rudisill to said J. H. Barnett, as aforesaid, was surrendered to said Rudisill or delivered to said complainant by said Abraham G. Barnett this defendant is ignorant.

This defendant admits the laying out into lots, streets, and alleys by himself and Zollinger and Kamm of a portion of the premises by them purchased as aforesaid, and files herewith a correct copy, marked Exhibit B, of the plat of said land so purchased, including the plat of said Burgess, Zollinger & Kamm's addition, and, defining the boundary line between Wells' pre-emption and the fractional southeast quarter of section thirty-five, in township thirty-one north, of range twelve east, in Allen county, Indiana, prays that the same may be taken as part of this answer.

He is ignorant of the exact location of the so-called Bloomingdale road, but for the purpose of this action admits that from the centre of the intersection of Burgess avenue and Lafayette street at the
northeast corner of the lot belonging to Mrs. E. Rudisill, as
135 appears on said plat, it extended in a direct line to where
the north line of Elizabeth street crossed Spy run. He is
sole owner of lots numbered one (1) to five (5) and eighteen to thirty-one (31), inclusive, as laid out on the plat of Burgess, Zollinger & Kamm's addition filed herewith, and he is owner of the undivided one-half of that part of said tract purchased of Henry J. Rudisill by Charles A. Zollinger, J. J. Kamm, and himself as aforesaid not laid out and platted as Burgess, Zollinger & Kamm's addition to the city of Fort Wayne.

This defendant further admits the sale by said Henry J. Rudisill of one undivided half of said mill property subject to said mortgage executed by said Henry J. Rudisill and Elizabeth E. Rudisill for the benefit of said Abraham G. Barnett and said estate of John H. Barnett.

This defendant further avers, on information which he believes to be true, that said John H. Barnett died a bachelor at the house of his brother, the defendant, Abraham G. Barnett; that for many years prior to his decease said John H. Barnett lived with and made the home of his said brother, Abraham G. Barnett, his home, and that they enjoyed their property, of which the greater portion was in the name of said John H. Barnett, in common; that during this period to the time of his decease said J. H. Barnett reposed the most implicit trust and confidence in his said brother, and for a 136 long time prior to his decease entrusted to his said brother the almost exclusive control and management of his property and business; that with the knowledge, consent, and concurrence of the devisees and legatees of said testator said Abraham G. Barnett took entire and exclusive possession, control, and management of the entire estate, both real and personal, of said testator, and for some years retained the same, paying the debts of the estate, leasing, repairing, and collecting rents of the real estate, disposing of the personalty, and performing all acts that a duly appointed, qualified, and acting executor, trustee, or agent with plenary powers might lawfully do and perform, and that all acts of said Abraham G. Barnett in relation to said estate have been performed by him in good faith and in the belief and with the understanding on his part and by the remaining devisees and legatees of said testator that all and singular his acts in the premises were authorized by the last will and testament of said testator in view of its terms and the personal trust and confidence by said testator reposed in his said brother, Abraham G. Barnett.

And defendant avers further that said trust and confidence of said testator in his brother, Abraham G. Barnett, and also the clear and undoubted intention of said testator to empower his said brother under said will alone without giving bond and qualifying under the statute as executor or the issuance to him by the probate 137 court of Allen county of letters testamentary to do and perform all acts in relation to said estate, including said release, that has by him in good faith been done, are clearly evinced by the terms of said will, and the peculiar and extraordinary powers conferred and sought to be conferred on Abraham G. Barnett by said John H. Barnett in his said will, which gives said Abraham G. Barnett, in common with his children, a large and valuable portion of testator's real estate in fee-simple and, as remainderman, the balance thereof, and, among other things, provides that said Abraham G. Barnett should have control of the valuable interests in the homestead devised to Catherine, Susan, Byron Huston, and James William Barnett, should determine the rights and liabilities of the testator's estate in said paper-mill and business carried on in the name of Freeman & Barnett from his peculiar and personal knowledge of the partnership agreement of said firm and the conditions thereto annexed; should have the sole control of the interests of Charles W. and James B. Wall in testator's share of said paper-mill and business devised jointly to them and said Abraham G. Barnett until said Charles W. Wall became of age and until said James B. Wall reached the age of twenty-five years, with the power at his discretion to sell said interest of said Charles W. and James B. Wall at such time and on such terms as he might see fit.

138 Should act as executor-in-fact and discharge the functions of an executor *de jure* without giving bond.

Should have full power and authority under said will alone to execute all trusts devolving upon a duly appointed and qualified executor, as though he had letters testamentary, as well as any trusts that might incidentally arise in the execution of the powers and duties conferred and imposed upon him by said will.

Should have the control and disposition of all said testator's personal property, moneys, and effects, reducing them to availibility, and should collect and control the rents of the real estate mortgaged to said George P. Bissell, and have the use of the remaining real estate until said rents should, in connection with the personality and the use of the homestead, be sufficient to pay all testator's debts, expenses of last illness and funeral, purchase and improve a lot in Lindenwood cemetery, pay for exhuming and reinterring the remains of testator's parents, and the erection of a suitable monument on said lot.

This defendant further avers, on information which he believes to be true, that immediately following the funeral obsequies of said testator said will was read and considered by the said Abraham G. Barnett and the remaining devisees and legatees together assembled, and, by the consent and concurrence of all said devisees and legatees, caused to be probated and recorded in said county of Allen
139 on the 7th day of February, 1875; that all said testator's
devisees, and legatees, after said consultation and consideration of said will, believed and understood that under and by virtue of its provisions said Abraham G. Barnett was entitled to the exclusive possession, control, and disposal of said testator's personal estate and to assume and perform the functions of a duly qualified and appointed executor and execute the various trusts by said will expressly conferred on him without giving bond, taking oath on the issuance to him by the probate court of Allen county of letters testamentary, and that in good faith, acting upon such belief, said Abraham G. Barnett took possession as aforesaid of the entire real and personal estate of said testator, assumed the functions of executor and trustee of said estate, and has ever since, with the knowledge, consent, and concurrence of the devisees and legatees, debtors and creditors of said John H. Barnett, particularly of George P. Bissell & Co., retained possession of and managed the same, collecting and compromising debts due the estate, paying debts of the estate, leasing the real estate, making repairs thereon, and collecting and disbursing the rents thereof, and in all ways dealing with said estate as one having the fullest and most ample power and authority, not alone as executor and trustee, but as general agent of all parties interested in said estate, except only that for some years past he has surren-
140 dered to his two sisters, Susan B. Shoaff and Mary Ann Wall,

the possession of the property in which they have life estates, and that George P. Bissell & Co. and the complainant have, since the death of said John H. Barnett, uniformly dealt with and recognized said Abraham G. Barnett as the authorized representative of the estate of the said John H. Barnett and those interested therein.

This defendant further avers, partly from his own personal knowledge and partly from information which he believes to be true, that said Henry Burgess, Charles A. Zollinger, J. J. Kamm, and Henry J. Rudisill, at the time said entry of release was made by said Abraham G. Barnett, knew of his (Abraham G. Barnett's) relations (business and other) to his deceased brother, and of his acting as and assuming the powers and functions of a fully empowered representative of said estate and the parties therein interested as aforesaid, with the apparent knowledge, consent, and concurrence of the parties interested, including the complainant and George P. Bissell & Co.; and relying thereon and upon the fact that said Abraham G. Barnett was the surviving joint creditor of said Newton B. Freeman, whose indebtedness to said brothers Barnett said mortgage so released purported to secure, and upon the further fact that said Abraham G. Barnett had with Newton B. Freeman carried on the firm business of said Freeman & Barnett aforementioned, in which the moneys loaned to said Freeman by said brothers Barnett, 141 as aforesaid, were invested, said Henry J. Rudisill executed said mortgage on the mill property as aforesaid, and delivered the same to the said Abraham G. Barnett for the benefit of himself and said estate, in consideration of said release, and said Burgess, Zollinger, & Kamm purchased said lands so released as aforesaid, paying therefor their then value in full, which is much more than the present value of said lands; and, further, that neither said Henry Burgess, Charles A. Zollinger, nor J. J. Kamm knew or suspected that there was any informality in said release, or that its validity could possibly be questioned, nor were aware of the consideration given for said release, but supposed said mortgage debt was, like the previously existing judgment liens, paid in full and satisfied.

This defendant further avers, upon information which he believes to be true, that said Abraham G. Barnett, in behalf of himself and said estate and the parties in interest, took said mortgage executed by said Henry J. Rudisill and wife on said mill property as the consideration of said release and retained the same until the commencement of this suit as a valid security for the indebtedness of said Newton B. Freeman to said brothers Barnett, and then or thereafter delivered and assigned the same to complainant, all with the knowledge and consent of the devisees and legatees of said testator, and that complainant accepted said assignment, and for the bene- 142 fit of said Abraham G. Barnett and the devisees and legatees of said testator instituted proceedings for the foreclosure thereof, as more fully appears from complainant's supplemental bill; and that the complainant, George P. Bissell & Co. and the devisees and legatees of said testator, with full knowledge of the facts hereinbefore stated and of the fact that transfers of various portions of said property released as aforesaid were being made to innocent purchasers in good faith for value, have never, prior to the commencement of this suit, questioned the validity of said release or claimed any interest in said premises.

Save as hereinbefore stated on information, which this defendant deems reliable and believes to be true, he denies every and all the allegations of complainant's original, supplemental, and amended bills which in any manner tends to establish any lien whatever in favor of the complainant or George P. Bissell & Co. upon any portion of the lands purchased as aforesaid by said Burgess, Zollinger, and Kamm from said H. J. Rudisill, and especially does he deny, upon information which he believes to be true, that said Henry J. Rudisill received five thousand dollars of said $8,000 loan, or any part thereof, from the brothers Barnett or any other person or persons with or without the consent or knowledge of complainant or George P. Bissell & Co.; that there was any agreement between the complainant or George P. Bissell & Co., and 143 said Henry J. Rudisill, before or at the time said $8,000 loan was made to said brothers Barnett by said G. P. Bissell & Co. that $5,000, or any part thereof, should be loaned, advanced, or paid to said H. J. Rudisill, and that he should give bond and secure the same by mortgage for the benefit and use of the said George P. Bissell & Co. or the complainant, or that said H. J. Rudisill should pay or assume the payment of five thousand dollars of said loan to George P. Bissell; that said Henry J. Rudisill executed the bond, a copy of which is filed with complainant's bill, to said John H. Barnett, or said mortgage recorded at page 276 of volume 21 of the mortgage records of Allen county, or either of them, as additional security for any part of said $8,000 loan to said George P. Bissell & Co., or in pursuance of a previous agreement, as in complainant's bill alleged, or that said Henry J. Rudisill executed said bond at the time said loan was made.

As to the amount due on said coupon bonds for principal, interest, exchange, and solicitor's fees; as to the time when the same became due; as to the exercise by the holders of said bonds of any option to declare the whole of said $8,000, with interest thereon, due and payable, and as to the relation complainant bears to the holders of said bonds or to George P. Bissell & Co., whether he is 144 trustee for any or all said parties, this defendant has no knowledge, except from complainant's original and amended bill, and therefore denies the averments of complainant's said bill touching those matters.

And, in accordance with the suggestion of this honorable court, this defendant makes by this his answer, instead of demurrer now withdrawn for such purpose, the following objections to complainant's said bill, viz:

1st. That this court has not jurisdiction to hear and determine any of the matters and things set forth as against this defendant.

2nd. That no legal representative of the estate of John H. Barnett, deceased, is named in or made a party to complainant's bill, whereas, from the statements therein contained, such legal representative (executor or administrator) of said estate appears to be a necessary party defendant thereto.

Wherefore, and for the further reason that Newton B. Freeman, herein mentioned, is not made a party defendant to complainant's said bill, this defendant prays this honorable court to be hence dismissed, without day, with his costs and expenses in this behalf sustained, and for such further relief as may be just and proper.

HENRY BURGESS.

Attest: S. R. ALDEN,
Solicitor for Defendant Burgess.

STATE OF INDIANA, }
Allen County, } *ss:*

145 Before me, this 27th day of January, 1881, personally appeared Henry Burgess and subscribed the above answer, and made oath that he has heard the same read and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to this 27th day of January, 1881, before me—

NOBLE C. BUTLER, *Clerk.*

EXHIBIT "A."

This indenture witnesseth that Henry J. Rudisill and Elizabeth E. Rudisill, his wife, in consideration of ten thousand ($10,000) dollars to them paid by Henry Burgess, Chas. A. Zollinger, & J. J. Kamm, the receipt whereof is hereby acknowledged, do grant, bargain, sell, and convey to the said Henry Burgess, Chas. A. Zollinger, and John J. Kamm, their heirs and assigns, forever, the following real estate in Allen county and State of Indiana, and described as follows, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot 8 of Wells' pre-emption, all in township 31 north, of range 12 east, more clearly described as follows, viz., commencing two (2) feet east of the southwest corner of lot number one (1) in Eckart's addition to Fort Wayne in said section 35; thence west along the south line of said addition to the water line of the feeder to the Wabash & Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Ft. Wayne, Jackson and Saginaw railroad; thence southeasterly along 146 the said right of way to the center of the Bloomingdale road; thence northeasterly with the center of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot (11) in Rudisill's subdivision of part of lot 8 of Wells' preemption; thence northerly at right angles to said street three hundred & forty-three (343) f't; thence easterly parallel with said Elizabeth street three hundred and eighty-seven (387) feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred & twelve (212) f't; thence west parallel with

Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning, saving and excepting that where said tract is subdivided into lots an alley twelve (12) feet wide must be left on the south and west sides of the lot occupied as a miller's residence, and also that a street fifty feet wide be left on the north and west sides of the tract of land now owned and occupied by Elizabeth Rudisill, and it is understood that the undivided one-half interest in value of said real estate is hereby conveyed to said Burgess, and the remaining undivided half in value to said Zollinger and Kamm, making the number of acres hereby covered sixteen acres, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said Henry Burgess, Chas. A. Zollinger, and J. J. Kamm, their heirs and assigns, forever; the grantors, their heirs and assigns, hereby covenanting with the grantees, their heirs and assigns, that the
147 title so conveyed is clear, free, and unincumbered; that they are lawfully seized of the premises aforesaid as of a sure and indefeasible estate of inheritance in fee-simple, and that they will warrant and defend the same against all claims whatsoever.

In witness whereof the grantors have hereto set their hands and seals this twenty-third (23) day of Jan'y, A. D. 1875.

HENRY J. RUDISILL. [SEAL.]
ELIZABETH E. RUDISILL. [SEAL.]

STATE OF INDIANA, Allen County, } ss:

Personally appeared before me, the subscriber, a notary public in and for said county, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, the grantors in the above conveyance, and acknowledged the same to be their voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal this twenty-third day of January, 1875.

[NOTARIAL SEAL.]

W. H. WITHERS,
Notary Public.

Received for record this 23 day of Jan., 1875, at 5 o'clock p. m., and recorded in record 64, pages 336 and 337.

JOHN M. KOCH,
Recorder for Allen County.

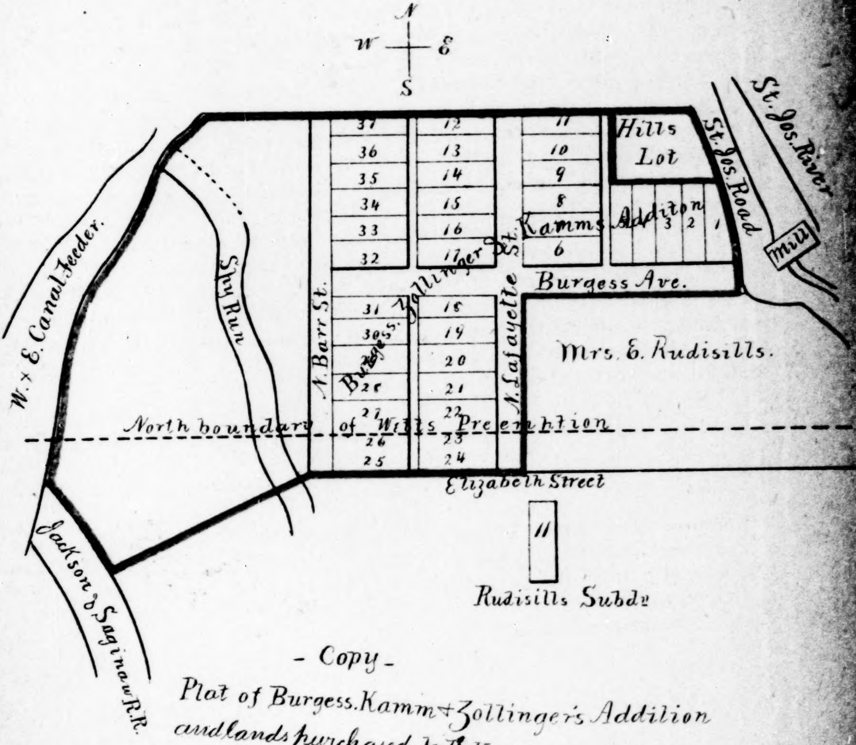
Duly entered for taxation this 23 day of January, 1875.

WM. T. ABBOTT,
Auditor for Allen County.

(Here follows diagram marked p. 148.)

149 And at the same time the defendants, Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, by S. R. Alden, Esq., their solicitor, also file their answer herein in the words following, to wit:

Exhibit B.



- Copy -

Plat of Burgess. Kamm + Zollinger's Addition and lands purchased by B. K + Z of H. J. Rudisill

"D"

Geo. D. Crane
Notary

No. 217
Wall et al
v.
Bissell et al.
p. 148.

In the Circuit Court of the United States in and for the District of Indiana. In Chancery.

GEORGE P. BISSELL *vs.* ABRAHAM G. BARNETT *et al.*

The joint and several answer of Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, three of the defendants, in the bill called Hanna, Andrew, and George Kamm, to the original, supplemental, and amended bill of complaint of George P. Bissell.

These defendants, reserving to themselves all right of exception to the said original, supplemental, and amended bill of complaint, for answer to so much thereof as they are advised is material or necessary for them or either of them to answer, say that they admit the death *death* and intestacy of J. J. Kamm and his relation to the defendants Kamms herein, as alleged in complainant's amended bill, and they also admit the execution and delivery by the defendant, Abraham G. Barnett, and John H. Barnett, his brother, since deceased, on the 15th day of July, 1869, of their eight coupon bonds in the sum of $1,000.00 each, in tenor and substance as appears from the copies thereof filed with complainant's bill as exhibits, and the execution and delivery by said John H. Barnett,
deceased, to the complainant on the same day as security
150 for the payment of said bonds of a trust deed of certain of his
property, in terms as appears from the copy thereof filed as an exhibit with complainant's bill.

And these defendants aver, upon information which they deem reliable and believe to be true, that said real estate so conveyed to said George P. Bissell in trust by said John H. Barnett is worth several thousand dollars more than the entire indebtedness of said John H. and Abraham G. Barnett, as evidenced by said bonds and the unpaid interest coupons thereto attached, and would sell on execution for more than enough to pay said indebtedness with all costs and expenses of collection.

These defendants admit further the death of said John H. Barnett, testate, on the — day of January, 1872, the probate and record of his last will and testament, of which a copy is filed as an exhibit with complainant's bill, and also the devise, as appears in said will, of certain interests in the property conveyed as aforesaid by John H. Barnett to George P. Bissell to certain of the defendants.

These defendants are not informed, except by complainant's bill, whether or not the said Abraham G. Barnett ever gave bond and qualified under the statutes of this State as executor of said John H. Barnett's estate.

These defendants aver, on information which they believe to be true and reliable, that about the time said George P. Bissell & Co.
made said loan of $8,000.00 to said brothers Barnett there
151 was formed the firm of Freeman and Barnett, in the fifth
clause of said will mentioned, consisting of Newton B. Freeman, who then was and still is a resident of the State of Indiana, and said brothers Barnett; that at or about that time the said brothers Barnett purchased the interest of the former partners of

said Newton B. Freman in the paper-mill built by said Freeman and the premises of said Freeman whereon the same was located and the machinery and business therewith connected, and in accordance with a previous understanding between said Freeman and themselves loaned him (Freeman) $5,000.00 of the $8,000.00 loan made to said brothers Barnett by said George P. Bissell & Co. as aforesaid; that said Freeman then invested said $5,000.00 in said firm's business, except the amount, to these defendants unknown, paid as commission to John Hough for negotiating said $8,000.00 loan, and said Freeman not having unincumbered real estate by which to secure the payment of the same to said brothers Barnett, Henry J. Rudisill, one of the defendants, and brother-in-law of said Freeman, and then supposed to be very wealthy, about that time or soon thereafter executed to said John H. Barnett for the use and benefit of said brothers Barnett, and not for the benefit or security or with the knowledge of said George P. Bissell & Co., to indemnify said brothers Barnett from loss by reason of their said $5,000.00 loan to their partner in said paper-mill business (Newton B. Freeman), his (Henry J. Rudisill's) bond in the penal sum of $10,000.00,
conditioned to pay said sum of five thousand dollars, with
152 interest thereon, according to the terms of the bonds heretofore mentioned from said brothers Barnett to said George P. Bissell & Co., a copy of which is filed as an exhibit with complainant's bill.

These defendants also aver, on information which they deem reliable and believe to be true, that about two and one-half years thereafter said Abraham G. Barnett, acting on the advice of a friend, who was an attorney, and knew that said Henry J. Rudisill was becoming involved, persistently importuned said Rudisill to give the mortgage — security for said indemnity bond, which said Barnett then claimed had been agreed on between them at or about the time said bond was given; that said Rudisill finally yielded to the importunities of said Barnett, and executed to John H. Barnett his mortgage deed, as theretofore drawn by an agent of said brothers Barnett, conveying to said J. H. Barnett for the benefit of the brothers Barnett all that portion of the fractional southeast quarter of section thirty-five (35), in township thirty-one north, of range twelve east, in Allen county, Indiana, bounded on the east by the St. Joseph's river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman, estimated to contain thirteen acres, and conditioned in words and figures as follows, viz: "To secure the payment of the following-described bond, to wit, a bond of even date herewith to secure the payment to George P. Bissell of certain coupon bonds bearing date July 15, 1869, to the amount of five
thousand dollars, as fully recited in said bond given by
153 said mortgagor to the said mortgagee," a copy of which mortgage is filed with complainant's bill as an exhibit.

These defendants do not know of their own knowledge, but, on credible information which they believe true, aver that prior to the execution of the aforesaid mortgage by said Rudisill to J. H. Barnett said Rudisill had agreed with said brothers Barnett to give a mortgage of his "St. Joe Mills," or mill property, to secure said brothers Barnett from loss by reason of their said loan to Newton B. Freeman.

And further, on information which they believe to be true, these defendants aver that said Henry J. Rudisill executed said $10,000.00 bond to said John H. Barnett as aforesaid solely as accommodation for his brother-in-law, Newton B. Freeman, to indemnify said brothers Barnett from loss by reason of their loan to said Freeman, and on no other and for no further consideration; that said Henry J. Rudisill never received any portion of said loan nor any consideration from said Freeman nor any person for the execution of said bond further than above stated; that said Henry J. Rudisill and wife executed said mortgage without receiving any consideration therefor whatever to please said Abraham G. Barnett, and that said Rudisill never paid any attention to said Bissell and Barnett loans, but that said firm of Freeman & Barnett and said Newton B. Freeman personally attended to the payment of interest on said $8,000 loan until the default set forth in complainant's bill.

154 These defendants further aver, upon information which they believe true, that said Henry J. Rudesill in the month of January, 1875, for the purpose of paying off and redeeming manifold mortgage, tax, and judgment liens encumbering his real estate, sold and, by warranty deed duly recorded, in which his wife joined, conveyed to Charles A. Zollinger and J. J. Kamm, for $5,000.00 cash, one undivided half, and to Henry Burgess, for $5,000 cash, the other undivided half, of the following real estate situate, lying, and being in the county of Allen and State of Indiana, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot number eight (8) of Wells' pre-emption, all in township thirty-one north, of range twelve east, more clearly described as follows: Commencing twenty-one feet east of the southwest corner of lot number one in Eckert's addition to the city of Fort Wayne, in said section thirty-five; thence west along the south line of said addition to the water line of the feeder to the Wabash and Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson and Saginaw railroad; thence southeasterly along the said right of way to the centre of the Bloomingdale road; thence northeasterly with the centre of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northeast corner of lot eleven in Rudisill's subdivision of part of lot eight of
Wells' pre-emption; thence northerly at right angles to said
155 street three hundred and forty-three feet; thence easterly
parallel with said Elizabeth street three hundred and eighty-seven feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning, a copy of which deed these defendants file herewith as part hereof, marked Exhibit "A."

These defendants further aver that said parcel of land contains nineteen acres, and that they as tenants in common with the defendants, Charles Kamm, Anna Kamm, Nellie Kamm, are the owners of lots numbered twelve and fourteen, and of the undivided half of lots numbered 32, 33, 34, 35, 36, & 37 in Burgess, Zollinger and Kamm's addition to the city of Fort Wayne, and also of an undivided one-fourth of that portion of said Burgess, Zollinger and Kamm purchase not platted as an addition to the city of Fort Wayne.

And, on information which these defendants believe to be true, they aver that nearly all said sum of ten thousand dollars was used in paying of liens of various kinds on said property as was at the time understood by said purchasers, and that, except an annuity mortgage to Mrs. Elizabeth Rudisill hereinafter mentioned, all encumbrances then appearing of record and shown in a complete abstract of the title of said premises were at the time of said pur-
156 chase, so far as appeared from the records of Allen county,
duly and formally released and satisfied.

These defendants aver further, on information which they believe to be true, that said Abraham G. Barnett, acting for himself and in good faith as executor *de facto*, trustee, and agent of the estate of said John H. Barnett, for himself and in behalf of the legatees and devisees of said testator, agreed with said Henry J. Rudisill to release and did release said premises purchased as aforesaid from any and all lien by reason of the mortgage heretofore mentioned, executed by said Henry J. Rudisill and wife to John H. Barnett, in consideration of the conveyance by said Henry J. Rudisill and wife by their mortgage deed to him, the said Abraham G. Barnett, for the benefit of himself and his said brother's estate, of the property which it was claimed said Rudisill originally agreed to mortgage for the indemnity of said brothers Barnett, as aforesaid, being all that tract of land known as the St. Joe mill property in section thirty-five, in township thirty-one north, of range twelve east, in the county of Allen and State of Indiana, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption; thence with the centre of the St. Joe road northerly to a point where the St. Joe turnpike intersects the same; thence easterly along the centre of said turnpike to the west quarter-post of section thirty-six in said township and range; thence south-
157 easterly with the eastern boundary of said mill site to the
bank of the St. Joe river; thence westerly with said river to the place of beginning, containing fifteen acres, more or less, as security for the performance of the conditions of the bond executed as aforesaid by said Henry J. Rudisill as indemnity to said Barnett brothers, and that said Henry J. and Elizabeth E. Rudisill, his wife, did execute and deliver to said Abraham G. Barnett for his and said estate's benefit, as so agreed, in consideration of said release, their mortgage deed of said mill property, dated on the 23rd day of January, 1875, conditioned to secure the performance of the conditions of said bond, which mortgage was duly recorded on the 26th day of January, 1875, in the mortgage records of Allen county, at page —, of

volume — thereof, a copy of which is filed [here]with as part of complainant's bill and marked Exhibit —; that said Abraham G. Barnett, as evidence of the aforesaid release, made upon the margin of the record of said first mortgage (executed to J. H. Barnett by said Rudisill) the entry of release and satisfaction in words and figures as set forth in complainant's bill about the time or shortly prior to said purchase by said Burgess, Zollinger, and Kamm, and that said Burgess, Zollinger, and Kamm were, at the time of the said purchase, ignorant of the alleged fact that said Abraham G. Barnett had not qualified or given bond under the statutes as executor of the estate of said J. H. Barnett.

158 These defendants aver that said St. Joe mill property or a part thereof and the premises purchased by Burgess, Zollinger and Kamm and released as aforesaid by A. G. Barnett were then encumbered by a mortgage duly executed by said Henry J. Rudisill and wife on the 30th day of October, 1860, and recorded at pages 500 & 501 of volume 7 of the mortgage records of said county on the 7 day of January, 1861, securing an annuity of eight hundred dollars to Elizabeth Rudisill, mother of said Henry J. Rudisill, but that over and above the entire amount of said encumbrance said mill property was worth at the time of said release by Abraham G. Barnett several thousand dollars more than the property so released unencumbered.

These defendants, further answering, admit that the bond executed by said Rudisill to indemnify said brothers Barnett was, as alleged in complainant's bill, assigned, to the complainant, and, on information which they believe true, these defendants aver that both said bond and said mortgage of said mill property securing the performance of its conditions were assigned and delivered to the complainant by said Abraham G. Barnett for the benefit of himself and the devisees and legatees of said John H. Barnett, deceased, and that complainant holds the same solely by virtue of their assignment and delivery to him by said Abraham G. Barnett for the benefit of himself and said estate, and as to whether the mortgage first executed by said Rudisill to said J. H. Barnett as aforesaid was surrendered to
159 said Rudisill or delivered to said complainant by said Abraham G. Barnett the defendants are ignorant.

These defendants further admit the laying out into streets and alleys by said Burgess, Zollinger, and Kamm of a portion of the premises by them purchased as aforesaid, and refer to Exhibit B of the answer of said Henry Burgess herein, which they aver is a correct plat of the premises so purchased, and the addition by said Burgess, Zollinger, and Kamm laid out, and which defines correctly the boundary line between Wells' pre-emption and the fractional southeast quarter of section thirty-five, in township thirty-one north, of range twelve east, in said county of Allen.

These defendants further admit the sale by Henry J. Rudisill of one undivided half of said mill property, subject to said mortgage executed by said Henry J. and Elizabeth E. Rudisill for the benefit of said Abraham G. Barnett and said estate of John H. Barnett.

These defendants aver, on information which they believe to be

true, that said John H. Barnett died a bachelor at the house of his brother, the defendant, Abraham G. Barnett; that for many years prior to his decease said John H. Barnett lived with and made the home of his said brother, Abraham G. Barnett, his own, and that they employed their property, of which the greater portion was in the name of said John H. Barnett, in common; that during this period to the time of his decease said J. H. Barnett reposed the most implicit trust and confidence in his said brother,
160 and for a long time prior to his decease entrusted to his said
brother the almost exclusive control and management of his property and business; that, with the knowledge, consent, and concurrence of the devisees and legatees of said testator, his brother, on the decease of said testator, took entire and exclusive possession, control, and management of the entire estate, both real and personal, of said testator, and for some years retained the same, paying the debts of the estate, leasing, repairing, and collecting rents of the real estate, disposing of the personalty, and performing all acts that a duly appointed, qualified, and acting executor, trustee, or agent with plenary powers might lawfully do and perform, and that all acts of said Abraham G. Barnett in relation to said estate have been performed by him in good faith and in the belief and with the understanding on his part and by the remaining devisees and legatees of said testator that all and singular his acts in the premises were authorized by the last will and testament of said testator in view of its terms and the personal trust and confidence by said testator reposed in his said brother, Abraham G. Barnett.

And these defendants aver, further, that said trust and confidence of said testator in his brother, Abraham G. Barnett, and also the clear and undoubted intention of said testator to empower his said brother under said will alone without giving bond and qualifying under the statute as executor or the issuance to him by
161 the probate court of Allen county of letters testamentary to
do and perform all acts in relation to said estate, including said release, that have by him in good faith been done, are clearly evidenced by the terms of said will and the peculiar and extraordinary powers conferred and sought to be conferred on said Abraham G. Barnett by said John H. Barnett in his said will, which gives said Abraham G. Barnett, in common with his children, a large and valuable portion of testator's real estate in fee-simple and as remainderman the balance thereof, and, among other things, provides that said Abraham G. Barnett should have control of the valuable interests in the homestead devised to Catharine, Susan, Byron Huston, and James William Barnett;

Should determine the rights and liabilities of the testator's estate in said paper mill and business carried on in the name of Freeman & Barnett, from his peculiar and personal knowledge of the partnership agreement of said firm and the conditions thereto annexed;

Should have the sole control of the interests of Charles W. and James B. Wall in testator's share of said paper mill and business devised jointly to them and said Abraham G. Barnett until said Charles W. Wall became of age and until said James B. Wall reached the age of twenty-five years, with the power at his discretion to sell said interests of said Charles W. and James B. Wall at such time and on such terms as he might see fit;

Should act as executor in fact and discharge the functions
162 of an executor *de jure* without giving bond;

Should have full power and authority under said will alone to execute all trusts devolving upon a duly appointed and qualified executor as though he had letters testamentary as well as any trusts that might incidentally arise in the execution of the powers and duties conferred and imposed upon him by said will;

Should have the control and disposition of all said testator's personal property, moneys, and effects, reducing them to availability, and

Should collect and control the rents of the real estate mortgaged to said George P. Bissell and have the use of the remaining real estate until said rents should, in connection with the personalty and the use of the homestead, be sufficient to pay all testator's debts, expenses of last illness and funeral, purchase and improve a lot in Lindenwood Cemetery, pay for exhuming and reintering the remains of testator's parents, and the erection of a suitable monument on said lot.

These defendants further aver, on information which they believe to be true, that immediately following the funeral obsequies of said testator said will was read and considered by said Abraham G. Barnett and the remaining devisees and legatees together assembled, and by the consent and concurrence of all said devisees and legatees caused to be probated and recorded in said county of Allen on the 7th day of February, 1875; that all said testators, devisees, and legatees after said consultation and consideration of said will
163 believed and understood that under and by virtue of its provisions said Abraham G. Barnett was entitled to the exclusive possession, control, and disposal of said testator's personal estate, and to assume and perform the functions of a duly qualified and appointed executor and execute the various trusts by said will expressly conferred on him without giving bond, taking oath, or the issuance to him by the probate court of Allen county of letters testamentary, and that in good faith, acting upon such belief, said Abraham G. Barnett took possession as aforesaid of the entire real and personal estate of said testator, assumed the functions of executor and trustee of said estate, and has ever since, with the knowledge, consent, and concurrence of the devisees and legatees, debtors, and creditors of said John H. Barnett, particularly of George P. Bissell & Co., retained possession of and managed the same, collecting and compromising debts due the estate, paying debts of the estate, leasing the real estate, making repairs thereon, and collecting and disbursing the rents thereof, and in all ways dealing with said estate as one having the fullest and most ample powers and authority, not alone as executor and trustee, but as general agent of all parties interested in said estate, except only that for some years past he has surrendered to his two sisters, Susan B. Shoaff and Mary Ann Wall, the possession of the property in which they have life estates, and that

George P. Bissell & Co. and the complainant have since the
164 death of said John H. Barnett uniformly dealt with and recognized said Abraham G. Barnett as the authorized representative of the estate of said J. H. Barnett and those interested therein.

These defendants further aver, upon information which they believe true, that said Henry Burgess, Charles A. Zollinger, J. J. Kamm, and Henry J. Rudisill, at the time said entry of satisfaction was made by said Abraham G. Barnett, knew of his (A. G. Barnett's) relations, business and other, to his deceased brother, and of his acting as and assuming the powers and functions of a fully empowered representative of said estate and the parties therein interested as aforesaid, with the apparent knowledge, consent, and concurrence of the parties in interest, including the complainant and George P. Bissell & Co.; and that relying thereon and upon the fact that said Abraham G. Barnett was the surviving joint creditor of said Newton B. Freeman, whose indebtedness to said brothers Barnett said mortgage so released purports to secure, and upon the further fact that said Abraham G. Barnett had with Newton B. Freeman carried on the firm business of said Freeman & Barnett aforementioned, in which the moneys loaned to said Freeman by said brothers Barnett as aforesaid were invested, said Henry J. Rudisill executed said mortgage on the mill property as aforesaid, and delivered the same to said Abraham G. Barnett for the benefit of himself and said estate in consideration of said release, and said Burgess, Zollinger, and Kamm purchased said lands so released as aforesaid, paying therefor their then value in full, which is much more than the
165 present value of said lands; and further that neither said Henry Burgess, Charles A. Zollinger, nor J. J. Kamm knew or suspected that there was any informality in said release, or that its validity could possibly be questioned, nor were aware of the consideration given for said release, but supposed said mortgage debt was like the previously existing judgment liens paid in full and satisfied.

These defendants further aver, upon information which they believe to be true, that said Abraham G. Barnett, in behalf of himself and said estate and the parties in interest, took said mortgage executed by said Henry J. Rudisill and wife on said mill property as the consideration of said release, and retained the same until the commencement of this suit as a valid security for the indebtedness of said Newton B. Freeman to said brothers Barnett, and then or thereafter delivered and assigned the same to complainant, all with the knowledge and consent of the devisees and legatees of said testator, and that complainant accepted said assignment, and for the benefit of said Abraham G. Barnett and the devisees and legatees of said testator instituted proceedings for the foreclosure thereof, as more fully appears from complainant's supplemental bill; and that the complainant, George P. Bissell & Co., and the devisees and legatees of said testator, with full knowledge of the facts hereinbefore stated, and of the fact that transfers of various portions of said property, released as aforesaid, were being made to innocent pur-
166 chasers in good faith for value, have never prior to the com-

mencement of this suit questioned the validity of said release or claimed any interest in said premises.

Save as hereinbefore stated on information which these defendants deem reliable and believe to be true, they deny every and all the allegations of complainant's original, supplemental, and amended bills which in any manner tend to establish any lien whatever in favor of the complainant or George P. Bissell & Co. upon any portion of the lands purchased as aforesaid by said Burgess, Zollinger, and Kamm from said H. J. Rudisill, and especially do they deny, upon information which they believe to be true, that said Henry J. Rudisill received five thousand dollars of said $8,000.00 loan, or any part thereof, from the brothers Barnett or any other person or persons with or without the consent and knowledge of complainant or George P. Bissell & Co.; that there was any agreement between the complainant or George P. Bissell & Co. and said Henry J. Rudisill before or at the time said $8,000.00 loan was made to said brothers Barnett by said G. P. Bissell & Co., that $5,000.00, or any part thereof, should be loaned, advanced, or paid to said H. J. Rudisill, and that he should give bond and secure the same by mortgage for the benefit and use of said George P. Bissell & Co. or the complainant, or that said H. J. Rudisill should pay, or assume the payment of, five thousand dollars of said loan to George P. Bissell & Co.; that said Henry J. Rudisill executed the bond, a copy of which is filed 167 with complainant's bill, to said John H. Barnett or said mortgage recorded at page 276 of vol. 21 of the mortgage records of Allen county, or either of them as additional security for any part of said $8,000.00 loan to said George P. Bissell & Co., or in pursuance of a previous agreement, as in complainant's bill alleged, or or that said Henry J. Rudisill executed said bond at the time said loan was made.

As to the amount due on said eight coupon bonds for principal, interest, exchange, and solicitor's fees; as to the time when the same became due; as to the exercise by the holders of said bonds of any option to declare the whole of said $8,000.00, with interest thereon due and payable, and as to the relation complainant bears to the holders of said bonds or to George P. Bissell & Co., whether he is trustee for any or all said parties, these defendants have no knowledge, except from complainant's original and amended bill, and therefore deny the averments of complainant's said bill touching those matters; and in accordance with the suggestion of this honorable court these defendants make by this their answer, instead of by demurrer, the following objections to complainant's said bill, viz: 1st, that this court has no jurisdiction to hear and determine any of the matters and things therein set forth as against these defendants or either of them; 2d, that no legal representative of the estate of J. H. Barnett, deceased, is named in, or made a party to, complainant's bill, whereas from the allegations and statements therein contained such legal representative (executor or ad- 168 ministrator) of said estate appears to be a necessary party defendant thereto.

Wherefore these defendants pray this honorable court to be hence dismissed without day, with their reasonable costs and expenses in this behalf sustained, and for such further relief as may be just and proper.

ANDREW J. KAMM.
HANNAH C. KAMM.
GEORGE L. KAMM.

Attest: S. R. ALDEN, *Def'ts' Sol'r.*

STATE OF INDIANA, *Allen County,* } *ss:*

Before me, this 19 day of January, 1881, personally appeared Andrew J. Kamm, Hannah C. Kamm, and George L. Kamm, and subscribed the foregoing answer, and having been by me first duly sworn, stated under oath that they have read the foregoing answer and know its contents, and that the same is true of their own knowledge, except as to matters therein stated on information and belief, and as to those matters they deem the information they have received reliable, and believe all and singular the allegations of said answer to be true.

Subscribed and sworn to before me this 19 day of January, 1881.

[SEAL.] JAMES B. HARPER,
U. S. Com'r.

EXHIBIT "A"

(Is the same as Exhibit "A" filed with the answer of Henry Burgess, and will be found on page 145 of this transcript.)

169 And at the same time the defendants, Watson Wall, Mary Ann Wall, John A. Shoaff, and Susan B. Shoaff, by L. M. Ninde, Esq., their solicitor, also file their answer herein in the words following, to wit:

In the Circuit Court of the United States, District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The joint answer of John A. Shoaff and Susan B. Shoaff, his wife, Watson Wall and Mary Ann Wall, his wife, defendants in said cause, to the plaintiff's amended bill of complaint.

The said defendants, by protestation, reserving to them all lawful exceptions to the said amended bill of complaint, for its manifest defects, uncertainties, and insufficiencies, nevertheless, for answer to so much thereof as they are advised is material for them to answer, say that they admit that the said Abraham G. Barnett and John H. Barnett executed the bonds, coupons, and trust deed, as averred in the complainant's bill mentioned, to secure the sum in said bill alleged to have been loaned by said Bissell & Co., but these defendants say that $5,000.00 of said sum was loaned to said Henry J. Rudisill, and that by an agreement entered into between said Abraham G. Barnett, John H. Barnett, dec'd, said Rudisill and John Hough, who was then acting in that behalf as the agent in said loan of said Bissell, that said Rudisill should execute his bond and mort-

gage to said John H. Barnett, binding him to repay to said Bissell & Co. five of said bonds and the interest thereon, and save
170 said Barnetts harmless thereon, and that pursuant to said agreement $5,000.00 of said money so loaned was paid over to said Rudisill, or to his order, and $3,000.00 thereof was received and used by said Barnetts, and the said Hough, as the agent of said Bissell, prepared said bond so executed by said Rudisill to said Barnett and procured said Rudisill to execute the same, and also the said mortgage, as additional security for said loan covered by said bonds and trust deed, of all which facts and agreements these defendants say they have no personal knowledge, but have been informed of the truth thereof and believe such information to be true.

These defendants admit that the copies of all said bonds, coupons, trust deed, and said bond and mortgage from said Rudisill to said John H. Barnett, deceased, as they are set forth with and made exhibits to said bill of complaint, are correct and true copies of said instruments.

And these defendants, upon information which they believe to be true, aver that as to said $5,000.00, part of said $8,000.00 loan so borrowed by said Rudisill, *that* he was the principal debtor to said Bissell as to said sum, and Barnetts were to be, and were in fact, only his sureties as to said sum, and that the land so mortgaged to secure the same by said Rudisill ought in equity and good conscience to be first sold to pay said sum and the accrued interest thereon and five-eighths of the costs accrued and to accrue in this suit.

171 And these defendants admit that said John H. Barnett died testate on said — day of January, 1872, and left the will described in said bill of complaint, and that the copy thereof set forth and filed with said bill is a true copy thereof, and that the same was duly probated as in said bill set forth, and that by said will the said testator devised the interest in said premises described in said trust deed as is in said bill set forth, which devised premises these respondents, Mary Ann Wall and Susan B. Shoaff, still own as the same were devised to them.

And these respondents also admit that the said Rudisill sold and conveyed to said Burgess, Kamm, and Zollinger the land so mortgaged to said John H. Barnett, and that said Zollinger afterwards sold his interest therein to said Bass and Simons, and that the same or part thereof has been laid out into town lots, streets, and alleys, as in said complainant's bill set forth; and they, answering further, admit that said Rudisill procured said A. G. Barnett to enter upon the record of said mortgage so executed by him a pretended release thereof, but they say that upon information they believe to be true they charge that said pretended release was made and procured fraudulently and without any power or authority whatever, so far as said A. G. Barnett is concerned to execute the same; that he had never taken out letters testamentary or given bond, as in the plaintiffs' amended bill set forth.

172 And these respondents, further answering, say that they are informed and believe such information is true; that said

A. G. Barnett, at the time he assumed, without any authority whatever as aforesaid to release said mortgage so executed by said Rudisill to said John H. Barnett, deceased, did also, without any authority whatever, assume to and did take another mortgage from said Rudisill, and on the property described in said plaintiff's complaint; but these respondents say that they never authorized said A. G. Barnett in any manner whatever to release said mortgage nor to take such new mortgage in their behalf, or otherwise; that they never knew or had any notice whatever that such release was executed or such new mortgage taken until after this suit was instituted, or about that time; that when they learned that such release was executed they objected promptly to such release, and denied said Barnett's right to execute the same.

And they, further answering, say that said premises covered by said mortgage so executed to said A. G. Barnett are encumbered with a large mortgage debt, due from Henry J. Rudisill to the defendant, Elizabeth Rudisill, which was a lien on said premises when said mortgage was so executed to said A. G. Barnett, and was and is prior thereto; that said premises are not worth in cash, upon judicial process, more than enough to pay said prior lien, and would be and are wholly worthless to your respondents as security for
173 said portion of said Bissell debt, assumed to be paid by said H. J. Rudisill, and the payment thereof secured by his said mortgage to said John H. Barnett, deceased.

And these respondents, further answering, say that they admit the death of said Kamm, and that he owned the property described, as in said bill set forth.

And these defendants, further answering, say that if the plaintiff in any manner whatever ratified or confirmed the said release of said mortgage so executed to said John H. Barnett by said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, he has done so in violation of the rights of these respondents; and if he has, by means thereof, destroyed their security for $5,000.00 of said loan, the plaintiff is and ought to be held responsable to these defendants; that as to said sum the said John H. Barnett was only surety, and his mortgage to the plaintiff only collateral security to secure such sum to the plaintiff; and the said Henry J. Rudisill was, as to said sum of $5,000.00, the principal debtor, and the mortgaged premises described in said mortgage to John H. Barnett, who, by the said contract of loan, took and held the same in trust for the plaintiff and for his own indemnity against all liability on account of said bonds and mortgage so executed by him to said Bissell to the extent of the said $5,000.00 so borrowed for said Rudisill, and they therefore aver that if the plaintiff has in any manner whatsoever ratified the said release or accepted the said second mortgage so executed by said
174 H. J. Rudisill and wife to said A. G. Barnett, or in any manner estopped himself from setting up and foreclosing said mortgage so executed to said John H. Barnett, by the acceptance of and suing upon the said mortgage given to A. G. Barnett, and asking the same foreclosed in this suit or otherwise, or if said plaintiff has done anything incompatible with his right to foreclose said first

mortgage, executed by said Rudisill to said J. H. Barnett, for the benefit and relief of these respondents, then they say that, as to the said sum of $5,000 and the interest, costs, and attorney's fees arising thereon, *they say* the plaintiff has willfully and without their knowledge or consent lost to them said mortgage so executed to said John H. Barnett, which was, and is, if not so sacrificed by said plaintiff, ample security to pay all of the present liability, including interest, costs, and attorney's fees, arising out of the said $5,000 so loaned to said Rudisill and so secured by him, and they ask that as to said $5,000, in case this court shall find that the plaintiff is estopped from any cause whatever from enforcing said mortgage, that in such case the plaintiff shall be decreed to have wasted said collateral security and that said debt sued on shall be declared to be discharged so far as these respondents are concerned and so far as the said lots described in said trust deed are concerned, which said lots by said will were devised to these respondents, Mary and Susan, for life, and which estate therein they yet own.

175 And these respondents, further answering, say that they are informed, and believe such information true, that the plaintiff never has done anything either to release said mortgage so executed to said John H. Barnett or to estop himself from enforcing the foreclosure of the same in this court, or in any manner prejudice the rights of these respondents, Mary and Susan, in said mortgage, or as to said mortgaged premises, and have never heard anything impeaching his said right to enforce said mortgage until they were informed of the averments of their codefendants, Burgess, Kamms, Simons, and Bass, in their said answers to said bill of complaint set forth, which they aver that they do not believe to be true.

Wherefore these defendants say that the entry of satisfaction of said mortgage by said Abraham G. Barnett was without authority and null and void, and that said mortgage is yet in full force and virtue in law, and they consent that the same be foreclosed and said mortgaged premises be decreed to be sold, and the proceeds of said sale applied to the payment of said bond so executed by said Henry J. Rudisill, and the part of the debt to said plaintiff specified in said bond; and these respondents further ask that their said interest in the real estate included in said trust deed be subject only to the sum of $3,000 and the accrued interest thereon, for which sum they consent to a decree of foreclosure to pass against the same, and as to the balance of said mortgage debt, interest thereon, and costs
176 they ask to be dismissed with their reasonable costs.

WATSON WALL,
MARY ANN WALL,
JOHN A. SHOAFF,
SUSAN B. SHOAFF,
By NINDE & ELLISON,
Their Solicitors.

THE STATE OF INDIANA, *Allen County:*

John A. Shoaff and Susan B. Shoaff, his wife, and Watson Wall and Mary Ann Wall, his wife, being duly sworn, say that they have heard the foregoing answer read and that the statements therein are true, so far as the same are made upon their own knowledge, and so far as the same are made upon information they believe the same to be true.

J. A. SHOAFF.
SUSAN B. SHOAFF.
MARY A. WALL.
WATSON WALL.

Subscribed and sworn to before me by the above-named Watson Wall and Mary A. Wall this 7th day of June, A. D. 1880.

[SEAL.] JULIUS ROBERTSON,
Notary Public, St. Louis, Mo.

(Commission expires Jan'y 25, 1882.)

John A. Shoaff and Susan B. Shoaff subscribed and swore to the above this 15th day of June, A. D. 1880.

[SEAL.] BAYLISS SWIFT,
Notary Public.

And it appearing to the court that the defendants, Harry Kamm, Anna Kamm, and Nellie Kamm, are infants, under the age 177 of twenty-one years, upon motion, S. R. Alden, Esq., is now appointed guardian *ad litem* of said infant defendants, and files his answer as such in the words following, to wit:

In the Circuit Court of the United States for the District of Indiana.
In Chancery.

GEORGE P. BISSELL *vs.* ABRAHAM G. BARNETT *et al.*

The answer of Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm, infants, four of the above-named defendants, by Samuel R. Alden, their guardian *ad litem*, to the original, supplemental, and amended bill of complaint of the complainant, George P. Bissell.

In answer to the said original, supplemental, and amended bill the defendants, Charles Kamm, Henry Kamm, Anna Kamm, [and] Nellie Kamm, by Samuel R. Alden, their guardian *ad litem*, say that they are infants, under the age of twenty-one years—that is to say, Charles Kamm, of the age of — years; Henry Kamm, of the age of — years; Anna Kamm, of the age of — years; Nellie Kamm, of the age of — years—and they submit their rights and interests in the matters in question in this cause to the care and protection of this honorable court.

S. R. ALDEN,
Guardian ad Litem.

And at the same time comes Abraham G. Barnett, by L. M. Ninde, Esq., his solicitor, and files his plea to the bill herein in the words following, to wit:

178 The several plea of Abraham G. Barnett, one of the defendants, to the bill of complaint of George P. Bissell.

This defendant, by protestation not confessing any of the matters in said bill contained to be true in manner and form as the same are therein set forth, does plead thereto, and for cause of plea says that heretofore, to wit, on the 31st day of January, 1877, this defendant was by the district court of the United States within and for the district of Indiana duly adjudged a bankrupt on his petition then in that behalf pending in said court, and afterwards, to wit, on the — day of ——, 18—, the said district court ordered that this defendant be forever discharged from all debts and claims which by law were proveable against his estate, and issued to this defendant a duly certified copy under the seal of said court of said order of discharge from all such debts and claims, a copy of which certified order of discharge is filed herewith and made by incorporation part hereof, and therefore this defendant pleads his said bankruptcy and the said adjudication, and the said order discharging him from his said debts and to all personal liability on account of the said bonds sued on in this case and so executed by this defendant to the plaintiff, and to the debt secured thereby, and humbly prays the judgment of this honorable court whether it behoove him
to make any other or further answer thereto as aforesaid, and
179 prays to be hence dismissed with his reasonable costs and
charges in this behalf most wrongfully sustained.

A. G, BARNETT.

By NINDE & ELLISON, *Solicitors.*

STATE OF INDIANA, *Allen County:*

Personally appeared before me, a notary public within and for said county, the above-named Abraham G. Barnett, who, being duly sworn by me, says that the facts set forth in his said plea above set forth are true.

Subscribed and sworn to before me this — day of June, 1880.

Witness my hand and official seal the day and year above written.

—— ——,

Notary Public, Allen County.

UNITED STATES OF AMERICA, *District of Indiana:*

District Court of the United States for the District of Indiana,
Sitting as a Court of Bankruptcy.

In the Matter of ABRAHAM G. BARNETT, Bankrupt. No. 2189.

Whereas Abraham G. Barnett has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in this behalf, it is therefore ordered by the court that said Abraham G. Barnett be forever discharged from all debts and claims which by said acts are made

180 provable against his estate and which existed on the 31st day of January, 1877, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

W. Q. GRESHAM.

Attested and sealed.

W. P. FISHBACK, *Clerk.*

And at the same time [comes] the complainant, by Mess. Coombs, Morris & Bell, his solicitors, and files his replication herein, in the words following, to wit:

Circuit Court of the United States, District of Indiana.

The replication of George P. Bissell, complainant, to the answers of John H. Bass, Oscar Simons, Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, defendants:

The repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereto, saith:

That he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in said answers contained material or effectual in law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and prays as in his said bill he hath already prayed.

COOMBS, MORRIS & BELL,
Solicitors for Complainant.

181 And at the same time Watson Wall *et al.*, by L. M. Ninde, Esq., their solicitors, file their cross-bill herein, in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Complaining, showeth unto your honors, your oratrixes, Mary A. Wall and Susan B. Shoaff, and your orators, Watson Wall, the husband of said Mary A. Wall, and John A. Shoaff, the husband of said Susan B. Shoaff, and Byron Heuston Barnett and James William Barnett, infants, who bring this bill of complaint by their guardian *ad litem* and next friend, L. M. Ninde, duly appointed by said court, that George P. Bissell, one of the defendants hereto, on the — day of ——, 1879, filed his bill of complaint in this honorable court against your orators and oratrixes, and Oscar A. Simons, John H. Bass, Henry Burgess, Charles A. Zollinger, Hannah C. Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, the widow and children of John J. Kamm, deceased; Henry J. Rudisill and Elizabeth E. Rudisill, his wife; Andrew Hoffmeister, Mary J. McCurdy and Alfred Hattersley, who are also made defendants hereto, and others, in which bill of complaint the said Bissell, among other things, prayed the foreclosure of a certain mortgage executed on the 15th July, 1869, by one John H. Barnett, late of said district, since deceased, to him, said Bissell, to secure eight coupon bonds for $1,000 each, also executed by said decedent, and another to said Bissell. 182 A copy of said mortgage and also of said bonds and the coupons thereto attached are made exhibits to said bill, in which bill said mortgage- premises are duly described as follows, to wit: All of lot 105, in the original plat of Fort Wayme, except a strip ten feet wide off the east side thereof; also a part of lot 106, in said original plat, commencing at a point on the east line of said lot thirty feet south of the northeast corner thereof, running thence south along said line twenty feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty feet; thence east at right angles therewith to the place of beginning.

And your orators and oratrixes further show unto your honors that at the time said John H. Barnett, deceased, so executed said mortgage to secure said eight bonds and the coupons thereto attached it was understood and agreed by and between said decedent and the said Bissell and the said H. J. Rudisill that $5,000 of said sum so borrowed of and secured to the plaintiff was borrowed for said Rudisill, and he was to and then and there agreed with said decedent and the plaintiff to repay to the plaintiff the said amount of said loan, and then and there executed to said decedent his penal bond in the sum of $10,000, conditioned that upon the payment of $5,000 of the said bonds so executed to the plaintiff by said decedent and A. G. Barnett, with the interest thereon as it became due according to the tenor and effect of said bonds, the said bond 183 should be void, else be and remain in full force, a full description of which bond and the condition thereto annexed is set forth in the plaintiff's said bill of complaint, and a copy thereof filed therewith and attached as an exhibit thereto; all of which are by incorporation made a part of this bill of complaint.

That at the same time when said loan was made and said Rudisill received $5,000 thereof and executed said penal bond for $10,000 to said decedent, he agreed to execute to said decedent a mortgage on certain real estate hereinafter described to secure the due and faithful performance of said bond and the payment of the money as therein stipulated; and that afterwards, to wit, on the 13 day of December, 1871, in pursuance of said agreement and as additional security for the payment of said $5,000 and the bonds so given by said Barnetts to secure the same, the said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, did execute and deliver to the said decedent, for the benefit and protection of said decedent and to secure the payment of said $5,000 to said plaintiff, a mortgage deed conveying to said Barnett the lands therein described, to wit, all that portion of the fractional southeast quarter of section thirty-five (35), township thirty-one (31) north, of range twelve east, bounded on the

east by the St. Joseph's river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman, which mortgaged premises
are now fully and particularly described as follows, to wit:
184 Commencing at the intersection of the east line of the Wabash
and Erie canal feeder with the south line of section 35, township 31 north, of range 12 east, of second principal maridian; thence north 86 degrees east along the south line of said section 35 nine (9) chains to the intersection of the centre line of the old Bloomingdale road; thence north 60½ degrees east along the centre line of said Bloomingdale road 13.50 chains to the right bank of the St. Joseph's river; thence north twenty-three degrees west along said right bank of river three and sixty-six hundre-ths (3.66) chains; thence south eighty-six degrees west 15.30 chains to the Wabash and Erie canal feeder; thence southwesterly along said canal feeder to the place of beginning, containing fourteen (14) acres, more or less.

And your orators and oratrixes further show unto your honors that as to said sum of $5,000, part of said sum of $8,000 so loaned by the plaintiff and secured to him by said eight bonds and mortgage deed executed by said decedent, the said decedent was only the surety of said Henry J. Rudisill, and the premises in said lots 105 and 106 so mortgaged to plaintiff were only so mortgaged as surety for said sum so loaned by the plaintiff, so far as the said $5,000 thereof, so received by said Rudisill was concerned, and that as to said $5,000 the said Rudisill was and is the principal debtor, and the said premises so mortgaged by him to said decedent is the
principal fund and security out of which said sum of $5,000
185 should be paid; that said Rudisill has wholly failed and re-
fused to pay said sum of $5,000 or any part of it, and has failed to pay the interest thereon falling due on the 15 January, 1875, and has not paid any part of the interest on said loan from that day until the present time, but that the interest on all said eight bonds was duly paid by your oratrixes, Susan B. Shoaff and Mary A. Wall, until the 15 January, 1879, when the same was not paid, and thereupon the said plaintiff and the holders of said bonds declared them due and payable, and the plaintiff instituted this suit to collect the same and to foreclose the said mortgage so executed to him by said decedent to secure the same.

And your oratrixes aver that they did during said period from 15 January, 1875, to the said 15 January, 1879, pay for said Rudisill and on account of the portion of said loan so received by him all the different installments of interest accruing thereon, amounting in the aggregate to the sum of $800 so paid by them.

And your orators and oratrixes further show unto your honors [that] the said John H. Barnett died testaie on the — day of ——, 1872, and by his will devised that portion of lot 106 in the original plat of Fort Wayne, described as follows, to wit: Commencing at a point on the east line of said lot 106, thirty feet south of the northeast corner thereof, running thence south along said line twenty feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty feet; thence east

at right angles therewith to the place of beginning, to your
186 oratrix Mary A. Wall, for her natural life; remainder to your
orator, Byron Hueston Barnett, in fee-simple; and by said will said testator devised all of said lot 105, in said original plat of Fort Wayne, except ten feet off the east side thereof, to your oratrix, Susan B. Shoaff for life; remainder to your orator, James William Barnett, in fee.

And your orators and oratrixes further show unto your honors that by said will, a copy of which is set forth and filed with the plaintiff's bill of complaint, and which by incorporation is made part hereof, the said decedent nominated said Abraham G. Barnett his executor, but he declined, failed, and refused to accept said trust, but renounced the same by then and there failing for more than twenty days after the said will was duly probated to qualify and give bond as such executor, and never has so qualified or given bond as such executor or otherwise, or lawfully assumed to discharge the duties as such executor, or execute the trusts created by or under said will; that no executor or administrator with the will annexed has ever been appointed to administer said estate of said John H. Barnett, deceased; that no security exists, or ever did exist, for the appointment of an executor or administrator for said estate; that there is no debt yet unpaid against said estate except the debt due the plaintiff and sued for in his said bill of complaint filed in
this suit, and there is no debt due the estate of said John H.
187 Barnett, deceased, except the said debt so due from said
Henry J. Rudisill, and secured by said bond and mortgage herein described and set forth.

Yet your orators and oratrixes show to the court that, to wit, on the 23rd day of January, 1875, said Abraham G. Barnett, confederating and combining with said defendant-, Henry J. Rudisill, Henry Burgess, Charles A. Zollinger, and John J. Kamm, for the purpose of fraudulently attempting to release said premises so mortgaged by said H. J. Rudisill to said John H. Barnett, deceased, from said mortgage lien, on said last named day entered on the margin of the record of said mortgage, then and yet being and remaining in the recorder's office of Allen county, the following statement, to wit:

"I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that portion of the S. E. ¼ of sec. 35, t'p 31, R. 12 east, this day conveyed by Henry Rudisill to H. Burgess, Chas. A. Zollinger, & J. J. Kamm.

"Witness my hand & seal as such executor Jan. 23, 1875.

"ABRAHAM G BARNETT, [SEAL.]
"Executor of the Estate of John H. Barnett, Dec'd."

And your orators and oratrixes further show to your honors that on said same day said Rudisill, as part of said scheme to consummate such fraud, executed to said Zollinger, Kamm & Burgess, and they accepted a deed of conveyance for the following portions of said
premises, to wit, a part of the S. E. ¼ sec. 35, and part of lot
188 8, of Wells reserve, all in township 31, R. 12 east, more clearly

described as follows: Commencing 2 feet east of southwest corner of lot No. 1, in Eckert's addition to Fort Wayne, in said section 35, thence west along the south line of said addition to the water line of the canal feeder; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson & Saginaw railroad; thence southeasterly along said right of way to the center of the Bloomingdale road; thence northeasterly with the center of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to the point due north of the northwest corner of lot 11, in Rudisill's subdivision of part of lot 8 in Wells' pre-emption; thence northerly at right angles to said street 343 feet; thence easterly parallel with said Elizabeth street 387 feet to the west line of St. Joe road; thence northerly with the line of said road 212 feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning, saving and excepting that when said tract is subdivided into lots and alleys 12 feet wide must be left on the south and west sides of the lot occupied as a miller's residence, and also that a street 50 feet wide shall be left on the north and west sides of the tract of land now owned and occupied by Elizabeth Rudisill, and it is understood that the undivided one-half interest in value of said real estate is hereby conveyed to said Henry Burgess.

189 And your orators and oratrixes aver that the said last-named deed by its said description conveyed said Rudisill's interest in all of said premises so mortgaged to said decedent, except about one acre thereof marked out and designated on the map of the survey thereof, herewith filed and marked Exhibit "A," as the "Mill lot;" that said Abraham G. Barnett, at the time he so assumed to release said mortgaged premises from said mortgage lien, pretended to take in his own name a mortgage to secure said penal bond for $10,000 on other property known as the Rudisill mill property, but your orators and oratrixes aver that the same was and is yet so encumbered that the said mortgage so taken thereon was and is utterly worthless as a security for said bond and the payments secured thereby.

And your orators further show to your honors that said defendants, Burgess, Kamm, and Zollinger, at the time they took said conveyance, knew full well that said Barnett had no right or authority whatever to release or in any manner discharge said mortgage, or effect the lien thereof upon said mortgaged premises, and that said Rudisill paid nothing upon said debt when the said discharge was made or at any other time, and that said mortgage on said mill property was of no value whatever to your oratrixes, or security to them, or protection or indemnity to them or their interests in said premises so devised to them.

190 And your orators and oratrixes further show unto your honors that said defendants Bass and Simons purchased said Zollinger's interest in said premises so mortgaged to said decedent with full knowledge that said Abraham G. Barnett, at the time he so executed said discharge, had no power or authority what

ever to execute the same or to deal with or in any manner release the same.

And your orators and oratrixes further show unto your honors that, although said loan of $8,000 was made by the said Bissell as aforesaid, $5,000 thereof to said Rudisill, upon which said John H. Barnett, deceased, was only liable as surety of said Rudisill as aforesaid, and for the payment of which said premises so devised to your oratrixes and orators, Byron Hueston Barnett and James William Barnett, was only held as collateral security and a secondary fund after the said premises so mortgaged therefor by said Rudisill should be wholly exhausted, yet said Bissell is seeking by his said original bill to have a foreclosure of said devised premises and a sale thereof for the payment of the whole of said sum of eight thousand dollars and the interest and costs accrued and to accrue thereon, all of which is contrary to equity and good conscience, and tend to the injury and oppression of your orators and oratrixes.

In tender consideration whereof and forasmuch as your orators and oratrixes have no remedy without the assistance of a court of equity, where matters of this nature are cognizable, to the
191 end therefore that said defendants may, respectively, full,
true, direct, and perfect answer make upon their respective oaths, according to the best of their respective knowledge, information, and belief, to all and singular the charges and matters aforesaid, as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated;

And that the said defendant Bissell be compelled by a decree of this court to prosecute his suit for the foreclosure of the said mortgage so executed by the said Henry J. Rudisill to said John H. Barnett, deceased, for the recovery of said sum of $5,000 and the interest and costs thereon accrued and to accrue, and for said sum of $1,800 so paid by your oratrixes for interest on said portion of said loan of $8,000 so loaned to said Rudisill as aforesaid, and that all of said sums, when so recovered, be applied by said Bissell in liquidation of said mortgage debt, for the payment of which said premises so devised to your orators and oratrixes as aforesaid was so mortgaged, and that said defendants Burgess, Kamms, Bass, and Simons and other owners under said Rudisill be decreed to pay to the plaintiff Bissell said sums, interest, and costs equitable apportionable thereto, or, in default, said mortgaged premises so described in said mortgage so executed by said H. J. Rudisill to said John H. Barnett, deceased, be decreed to be foreclosed and said premises sold to pay the same before your oratrixes and orators shall be decreed to be in any manner
192 liable therefor, and that said pretended satisfaction of said
Rudisill be declared to be wholly made without any authority whatever, and that the same is fraudulent and void, and that if such foreclosure of the said Rudisill mortgage as above prayed for shall for any cause be inequitable that then and in such case the same may be decreed to be foreclosed in favor of your oratrixes and your orators, James William Barnett and Byron Hueston Barnett, and that they may recover said sum of $5,000 and the accrued in-

terest thereon and the interest they have paid to said Bissell thereon for said Rudisill, and that your orators and oratrixes may have further and other relief in the premises as the nature of their case —: Therefore will your honors grant unto your orators and oratrixes the writ of subpœna, issuing out of and under the seal of this court, to be directed to said defendants, George P. Bissell, Oscar A. Simons, John H. Bass, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nillie Kamm, Henry J. Rudisill, Elizabeth Rudisill, his wife; Andrew Huffmeister, Mary J. McCurdy, and Alfred Hattersley, commanding them and each of them by a certain day, and under a certain penalty therein inserted, to appear before your honors in the circuit court of the United States for the district of Indiana, and then and there [to] answer the premises and abide the order of court.

NINDE & ELLISON,
Solicitors for Plaintiffs.

(Here follows diagram marked p. 193.)

194 And at the same time the defendants, Simons, Bass, Henry Burgess, Hannah Kamm, Andrew J. Kamm, and George L. Kamm, by S. R. Alden, Esq., and R. S. Taylor, Esq., their solicitors, and file their answer to the cross-bill of Watson Wall *et al.* in the words following, to wit:

In the Circuit Court of the United States in and for the District of Indiana. In Chancery.

GEORGE P. BISSELL *vs.* ABRAHAM G. BARNETT and Others.

The joint and several answer of Henry Burgess, Oscar A. Simons, John H. Bass, Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, six of the defendants to the cross-bill of Watson Wall, Mary A. Wall, John A. Shoaff, Susan B. Shoaff, Byron Hueston Barnett, and James William Barnett, six other of the defendants.

Said six defendants first above named, respectively, now and at all times hereafter saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said cross-bill of said six last-named defendants contained, for answer to so much thereof as they are advised is material or necessary for them or either of them to answer, admit the loan by George P. Bissell & Co. of $8,000 to John H. and Abraham G. Barnett, and the execution by said J. H. and A. G. Barnett of their eight coupon bonds as evidence thereof, and by said J. 195 H. Barnett of his trust deed of lot 105 and part of lot 106 in the original plat of Fort Wayne, Allen county, Indiana, as security for said loan, as set forth in complainant's amended bill and referred in said cross-bill, and as shown by exhibits filed with said amended bill, and allege that said premises are worth and would sell for much more than the amount secured by said trust deed.

These defendants aver that, some time prior to the making of said loan by said G. P. Bissell & Co. to said J. H. & A. G. Barnett, it was by said J. H. and A. G. Barnett *it was by said J. H. and A. G. Barnett* and one Newton B. Freeman, then and still a resident of the State of Indiana, determined and agreed that the working capital of the firm of Freeman and Barnett should be increased several thousand dollars, and that for the purpose of increasing said capital a loan should be negotiated and procured of said G. P. Bissell & Co.

These defendants aver further that said firm consisted of said Newton B. Freeman and Abraham G. Barnett as active, and said John H. Barnett as passive, partners; that said firm purchased, about that time, the paper mill and business therewith connected, located at Fort Wayne and mentioned in the last will of said John H. Barnett, from the former owners, one of whom was said N. B. Freeman; that said N. B. Freeman, not having available real estate to offer as security for a loan, procured his brother-in-law—the defendant, Henry J. Rudisill—then supposed solvent and
196 very wealthy, to become security for him; that said H. J.
Rudisill agreed with said J. H. & A. G. Barnett to become security for said Freeman and to mortgage, jointly with said J. H. Barnett, for the benefit of said Freeman and said J. H. & A. G. Barnett, the St. Joe mill property of said Rudisill and the aforementioned lots of said J. H. Barnett; that with this understanding said J. H. & A. G. Barnett and said Rudisill offered to one John Hough, agent of said George P. Bissell & Co., as security for a loan of $8,000, said mill property and lots, but that said George P. Bissell & Co. refused to make the loan with said Rudisill on his property as security, whereupon said $8,000 loan was negotiated by said Hough for said J. H. & A. G. Barnett, whose bonds and trust deed aforementioned said George P. Bissell & Co. took as security, and advanced and paid to said Barnetts therefor the sum of $8,000.

That soon after the negotiation of said $8,000 loan said A. G. Barnett procured said H. J. Rudisill to execute a bond in the penal sum of $10,000 to said J. H. Barnett for the benefit of both said Barnetts, conditioned to pay $5,000 of the said $8,000 borrowed by said Barnetts of said Bissell & Co., as aforesaid, a copy of which is filed with complainant's bill and referred to in said cross-bill; that about two years subsequent to the execution of said bond by said Rudisill, to wit, on the 13th day of December, 1871, said A. G. Barnett, acting on the advice of a friend and attorney who knew that
197 said Rudisill was becoming involved, importuned said Rudi-
sill until he finally executed, with his wife, a mortgage prepared and drawn by the agent of said Barnetts, conditioned in words and figures as follows, to wit: "To secure the payment of the following-described bond, to wit: A bond of even date herewith to secure the payment to George P. Bissell of certain coupon bonds, bearing date July 15, 1869, to the amount of five thousand dollars, as fully recited in said bond, given by said mortgagor to the said mortgagee"—a copy of which is filed with complainant's amended bill and referred to *by* said cross-bill.

2

These defendants further aver that said J. H. Barnett used a portion of said $8,000, by himself and said A. G. Barnett borrowed as aforesaid, for his own private purposes, and that the balance thereof was invested in said firm business, about $4,500 thereof being credited to said Newton B. Freeman; that said Henry J. Rudisill never received any portion thereof, and only executed said bond as indemnity to said Barnetts for the portion of said loan by them advanced to said Freeman, and on no other and for no further consideration, and that said Rudisill and wife executed said mortgage without having received any consideration therefor whatever and solely to please said A. G. Barnett.

These defendants further aver that said Henry J. Rudisill, in the month of January, 1875, for the purpose of paying off and redeeming manifold mortgage, tax, and judgment liens and sheriff's 198 sales encumbering his real estate, sold and conveyed by warranty deed duly recorded, in which his wife joined, to Charles A. Zollinger and J. J. Kamm, for $5,000 cash, one undivided half, and to Henry Burgess, for $5,000 cash, the remaining undivided half, of the following real estate, situate, lying, and being in the county of Allen and State of Indiana, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot number eight (8) of Wells' pre-emption; all in township thirty-one (31) north, of range twelve (12) east, more clearly described as follows: Commencing twenty-one feet east of the southwest corner of lot number one, in Eckert's addition to the city of Fort Wayne, in said section thirty-five; thence west along the south line of said addition to the water line of the feeder to the Wabash and Erie canal; thence southeasterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson and Saginaw railroad; thence southeasterly along the said right of way to the centre of the Bloomingdale road; thence northeasterly with the centre of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot eleven in Rudisill's subdivision of part of lot eight of Wells' pre-emption; thence northerly at right angles to said street three hundred and forty-three feet; thence easterly parallel with said Elizabeth street three hundred and eighty-seven feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve feet; thence west parallel with Elizabeth street to a 199 point due south of the place of beginning; thence north to the place of beginning; a copy of which deed is filed as an exhibit herewith, marked "A."

That except about $200 said entire sum of $10,000 was used to pay off the liens of various kinds on said property, and that all encumbrances then shown in a full and complete abstract of the title of said premises, except an annuity mortgage to Elizabeth Rudisill hereinafter mentioned, were at the time of said purchase, so far as appeared from the records of Allen county, duly and formally released, redeemed, or satisfied.

These defendants further aver that prior to said purchase, to wit, on the 2nd day of February, 1872, said John H. Barnett died testate;

that his brother, said A. G. Barnett, whom he had in his will named as his executor, duly probated said will on the 7th day of February, 1872, and that said Abraham G. Barnett, acting for himself and in good faith as executor, *de facto* trustee, and agent of the estate of his deceased brother, for himself and in behalf of the devisees and legatees of said testator, prior to the consummation of the aforesaid purchase, agreed with said Rudisill to release, and did release, said premises purchased as aforesaid from any and all lien by reason of the mortgage heretofore mentioned from Henry J. Rudisill and wife to John H. Barnett, which mortgage purported to be a lien 200 on the greater portion of said premises, in consideration of the conveyance by said Henry J. Rudisill and wife, by their mortgage deed to him, A. G. Barnett, for the benefit of himself and of said estate of his deceased brother, of all that tract of land known as the St. Joe mill property, more particularly described in complainant's bill, which mortgage was conditioned to secure the performance of the conditions of said bond executed by said Rudisill as indemnity to said brothers Barnett, and duly recorded on the 26th day of January, 1875, in the mortgage records of Allen county, Indiana, at page —, of volume —, and that said A. G. Barnett, as evidence of the aforesaid release, made upon the margin of the record of said mortgage executed by said Rudisill and wife to J. H. Barnett the entry of release and satisfaction thereof in words and figures as set forth in complainant's bill, and in said cross-bill, about the time or shortly prior to said Burgess, Zollinger, and Kamm purchase; that said St. Joe mill property and the premises purchased as aforesaid by said Burgess, Zollinger, and Kamm were at the time of said release, and had been for years prior to the execution of the mortgage so appearing to be released, encumbered by a mortgage from said Rudisill and wife to Elizabeth Rudisill to secure an annuity of $800, duly executed, delivered, and recorded some years prior to any of the transactions hereinbefore mentioned, but that over and above said encumbrance said mill property was at the time of said release worth several thousand dollars more 201 than the premises sold as aforesaid to said Burgess, Zollinger, and Kamm.

These defendants further aver that said Burgess, Zollinger, and Kamm made said purchase in good faith, and in the belief that all encumbrances on said premises so purchased, except said annuity mortgage, were fully paid and satisfied, and were entirely ignorant of the fact that said A. G. Barnett had not qualified, given bond, and taken out letters testamentary as executor of his deceased brother's estate, and had no knowledge or suspicion that there was anything informal or questionable about said entry of release by A. G. Barnett, or that its validity was open to question.

These defendants further aver that the devisees and legatees of said testator met and read over together and discussed his will directly after his burial, and that it was then and there understood and acquiesced in by all of them that said will gave to said A. G. Barnett full power and authority, without bond, oath, or letters testamentary, to take the entire control and disposition of the per-

sonal estate of said testator, and for an indefinite period to control the real estate and collect the rents thereof for the purpose [of] carrying out certain trusts, paying debts of testator, &c., as in said will set forth; and that thereupon said A. G. Barnett, acting upon such
understanding, did cause said will to be probated on the 7th
202 day of February, 1872, and did at once take possession of
the entire estate, real and personal, of said testator and assume the functions of executor and trustee of said estate with the knowledge, consent, and concurrence of the devisees and legatees, debtors and creditors, of said testator, and has ever since exercised entire and exclusive control of the personalty, and for several years of the realty, collecting and compromising debts due the estate, and paying debts of the estate, leasing the real estate, insuring the same and making repairs thereon, collecting and disbursing the rents thereof, and in all ways dealing with said estate as one having the most ample power and authority, not alone as executor and trustee of said estate, but as general agent of all parties therein interested, and in the management of said estate has received and paid out thousands of dollars; all of which has been done with the acquiescence, concurrence, and consent of all parties interested in said estate; and that the sole act of said A. G. Barnett during the entire management and settlement of said estate, extending over a period of nine years, ever questioned by any of the parties in interest, is the aforementioned release, and that the same was never questioned prior to the institution of this suit.

These defendants further aver that said John H. Barnett died a bachelor at the house of his brother, the said A. G. Barnett; that
for many years prior to his decease said John H. Barnett lived
203 with and made the home of his said brother his own, and
that they enjoyed their property, of which the greater portion was in the name of said J. H. Barnett, in common; that during this period to the time of his decease the said John H. Barnett reposed the most implicit trust and confidence in his said brother, and for a long time prior to his decease intrusted his said brother with the almost exclusive management and control of his property and business.

These defendants further aver that as appears by the last will of said J. H. Barnett, a copy of which is filed as an exhibit with complainant's amended bill and referred to in said cross-bill, full power and authority was given to said A. G. Barnett to release said mortgage to J. H. Barnett by virtue of said will duly probated, and that said H. J. Rudisill, knowing that said A. G. Barnett had ever since the death of his said brother assumed and performed all the functions and powers of an executor and trustee of said testator's entire estate as well as of general agent of all parties interested in said estate with the approval, consent, and concurrence of all such interested parties, and believing, as did said A. G. Barnett and the devisees and legatees of said testator, that said will duly probated alone gave said A. G. Barnett the power to release said mortgage, accepted such release and in consideration therefor gave said mortgage on his St. Joe mill property.

204 These defendants further aver that said A. G. Barnett, about the time this suit was instituted, assigned by delivery said bond and mortgage, executed by said H. J. Rudisill to J. H. Barnett, and said mortgage, executed by said H. J. Rudisill and wife to A. G. Barnett in consideration of said release, to the complainant, and that complainant thereupon, for the benefit of said Barnett's estate and of said A. G. Barnett, accepted said assignment and instituted suit for the foreclosure of both said mortgages, as appears more fully in complainant's supplemental bill.

Save as hereinbefore stated or admitted, these defendants deny every and all the allegations of said cross-bill which in any manner tend to establish any claim upon or lien against the property purchased by Burgess, Zollinger, and Kamm, as herein described, in favor of either the complainant or said cross-complainants, and especially do they deny that at the time said $8,000 loan was made to the brothers Barnett by said G. P. Bissell & Co. that there was any understanding or agreement whatever between the complainant, John H. Barnett, and H. J. Rudisill; that any portion of said loan was made for said Rudisill, or that said $10,000 bond was executed by H. J. Rudisill at the time, or was any part of the transaction between complainant and the brothers Barnett; and they further deny that said Rudisill, at the time he executed said bond or theretofore agreed to mortgage any portion of the premises purchased by said Burgess, Zollinger and Kamm as security for 205 said bond, or that the execution of the mortgage hereinbefore mentioned to J. H. Barnett, on the 13th day of December, 1871, was in pursuance of any agreement made by said Rudisill at the time of or before the negotiation of said $8,000 loan to the brothers Barnett, or that said mortgage was given as additional security for the complainant's debt.

Further, these defendants deny the correctness of the alleged particular description of the property purporting to be covered by said mortgage to J. H. Barnett dated December 13th, 1871.

These defendants further deny that said J. H. Barnett was by operation of law or otherwise surety of said Rudisill for any portion of said $8,000 loan; that any part of the interest upon said $8,000 loan has been paid by the cross-complainants, Susan B. Shoaff and Mary A. Wall; that the holders of said eight $1,000 bonds declared them due and payable; that said cross-complainants paid at any time for Henry J. Rudisill, in interest on said loan or otherwise, $1,800 or any part thereof; that A. G. Barnett failed and refused to assume and execute all duties and trusts devolving upon him under said will of J. H. Barnett.

And, further, these defendants deny all confederation or conspiracy of any kind or for any purpose touching any of the interests of said cross-complainants or the complainant in said J. H. Barnett's estate and all knowledge thereof on the part of said A. G. Barnett, H. J. Rudisill, Henry Burgess, Charles A. Zollinger, 206 and J. J. Kamm, or either of them.

These defendants further deny that the alleged "mill lot" is the only portion of the premises purporting to be conveyed by said mortgage to J. H. Barnett by H. J. Rudisill not conveyed to Burgess, Zollinger, and Kamm, but aver that, as shown by Exhibit A, filed with said cross-bill, there is a triangular piece of land, containing one-fourth of an acre, now claimed by Mrs. Elizabeth E. Rudisill, as well as a plat of land north of the mill, including the "head race" of said mill, still covered by said mortgage, which have never been released therefrom.

And these defendants aver that said J. J. Kamm died, leaving his estate hopelessly involved, and that his heirs are unable to advance any money for redemption or the protection of their interests.

And in pursuance of the direction of this court, for the purpose of saving delay, these defendants raise by this their answer instead of by demurrer and plea the following objections to said cross-bill and the relief therein prayed:

1st. That, as appears from the allegations and statements contained in said cross-bill, this court has no jurisdiction to hear and determine any of the matters and things in said cross-bill alleged as against these defendants or any one of them.

2nd. That it appears by the said cross-bill that it is necessary
that the estate of John H. Barnett, deceased, therein named,
207 be represented in this suit, but no legal representative of the
estate of said decedent is named or made a party to said cross-bill.

3rd. That it appears from the allegations of said cross-bill that the estate of John H. Barnett, therein named the devisor, under whom said cross-complainant's claim has not been administered, and that therefore said devisees are not entitled to sue for the collection of said Rudisill bond and the foreclosure of said Rudisill mortgage, both of which appear by said cross-bill to be assets of said estate.

4th. That, as appears in this answer, Newton B. Freeman is a necessary party defendant to said cross-bill and the party immediately and primarily liable for the $5,000 which the cross-complainants are seeking to recover by foreclosure and sale of the property of these defendants, but has not been made a party thereto.

Wherefore these defendants pray to be hence dismissed as to said cross-bill, with their reasonable costs and charges herein sustained.

TAYLOR & MORRIS,
Solicitors for Bass & Simons.
S. R. ALDEN,
Solicitor for Burgess & the Kamms.

And at the same time S. R. Alden, as guardian *ad litem*, files his answer to the cross-bill of Watson Wall *et al.* in the words following, to wit:

208 In the Circuit Court of the United States in and for the District of Indiana. In Chancery.

GEORGE P. BISSELL *vs.* ABRAHAM G. BARNETT *et al.*

The answer of Charles Kamm, Anna Kamm, Nellie Kamm, Henry Kamm, infants, five of the above-named defendants, by Samuel R. Alden, their guardian *ad litem*, to the cross-bill of Watson Wall, Mary A. Wall, John A. Shoaff, Susan B. Shoaff, Byron Hueston Barnett, and James William Barnett.

In answer to the said cross-bill the defendants, Charles Kamm, Anna Kamm, Nellie Kamm, Henry Kamm, by Samuel R. Alden, their guardian *ad litem*, say that they are infants, under the age of twenty-one years—that is to say, Charles Kamm of the age of — years, Anna Kamm of the age of — years, Nellie Kamm of the age of — years, Henry Kamm of the age of — years, and they submit their rights and interests in the matters in question in this cause to the care and protection of this honorable court.

S. R. ALDEN,
Guardian ad litem.

And at the same time the defendants, Mary A. Wall and Susan B. Shoaff, by Ninde & Ellison, their solicitors — and file their answer to the cross-bill of Oscar A. Simons and John H. Bass in the words following, to wit:

The joint answer of Mary A. Wall and Susan B. Shoaff to the bill of complaint of Oscar A. Simons and John H. Bass.

209 The said defendants, by protestation, reserving to them all lawful exceptions to the said amended bill of complaint for its manifest defects, uncertainties, and insufficiencies, nevertheless, for answer to so much thereof as they are advised is material for them to answer, say that they admit the execution of the mortgage by said Henry J. Rudisill and Elizabeth Rudisill, his wife, to the said Elizabeth Rudisill on the 30 day of October, 1860, and that the same covered the lands therein described, and to secure the payments as therein set forth, and that the same was duly recorded as averred.

And they further admit that, as averred in said bill of complaint, the said Henry J. Rudisill and wife conveyed to said John E. Hill the land as set forth in said bill, and that said Elizabeth Rudisill assigned to said complainants the said mortgage as averred, as they are informed; but whether there is due and unpaid on said mortgage the sums averred in said bill, or any other sums, these defendants have no knowledge, information, or belief, and ask strict proof thereof.

And they deny that said Elizabeth Rudisill is a robust woman or in good health, but aver that she is feeble and has been subject to severe sickness, and that during the past year she became and was very ill and nigh unto death, and has only partially recovered therefrom, and that her life interest in her said mortgaged premises is not of great value. And these defendants deny that there is any

$5,000 due to the complainants on said mortgage so assigned to them, and, from information which they believe to be true, these defendants aver that large payments have been made to the
210 said Elizabeth Rudisill by said Henry J. Rudisill which
have never been credited on said installments secured by said mortgage heretofore coming due; that said defendant Hill, as these defendants are informed and believe, also paid to said Elizabeth Rudisill large sums of money and property for and on account of said mortgaged debt. And these defendants protest and object to this court estimating in any manner whatever the present value of the annuities and installments secured to be paid for and during the lifetime of said Elizabeth by said mortgage, but that if anything shall be found due for unpaid installments in the past that the plaintiffs be awarded a decree of foreclosure for such sum and no more.

And these defendants admit that said H. J. Rudisill executed the bond on the 15th day of July, 1869, to said John H. Barnett, deceased, and in the penal sum of $10,000, and with the condition thereunder written, and on the — day of December, 1871, and not on the — day of February, 1872; that said Rudisill and wife executed to said John H. Barnett the mortgage described in said bill as therein set forth, and that last-named mortgage was executed to secure, and did secure, the payment of the said sums stipulated to be paid in said bond. And these defendants aver that said last-named mortgaged premises so conveyed to said John H. Barnett, [by] said last-named mortgage [is] described as follows, to wit: All that portion of the fractional southeast quarter of section 35, township 31, range 12 east, bounded on the east by the St. Joseph's river, south by the Bloomingdale road,
211 west by the feeder to the Wabash and Erie canal, and on the
north by the lands of Julia A. Freeman, estimated to contain 13 acres, is a part of the land included in and covered by the said mortgage described in the complainants' bill as executed to the said Elizabeth Rudisill and sold and assigned by her to them; and these defendants aver that if the complainants shall be decreed to be entitled to a foreclosure of said mortgage to make any sum this court may find due to them that ought in equity to first make their said mortgage debt out of the other part and portions of said mortgage- premises so covered by their said mortgage before they be allowed to interfere with the said mortgaged premises so described in said mortgage so executed to said John H. Barnett; and these defendants aver that said John E. Hill purchased his said interest in said mortgaged premises so covered by the complainants' said mortgage long after the execution of the mortgage to said John H. Barnett, and therefore that in any decree that may be rendered in this court for the complainants these defendants ask may be ordered to be first levied upon all the remaining portions of said mortgaged premises, and the same be exhausted before the property so conveyed and mortgaged to said John H. Barnett be taken or sold; and these defendants expressly deny that said $5,000 so secured by said mortgage executed to said John H. Bar-

nett was loaned by the said Barnetts to said Newton B. Freeman,
and that said Henry J. Rudisill was surety only for said Free-
212 man in his said obligation so given to secure the repayment
thereof; and these defendants, upon information they be-
lieve to be true, aver that said Rudisill was and is yet the only debtor under obligation to pay said $5,000, and that said Freeman never gave any obligation or promise to said John H. Barnett to pay the same, nor did said Barnetts loan said money to said Freeman as in said bill averred.

And these defendants further aver that said mortgage so executed by said Rudisill and wife to said John H. Barnett was duly recorded in the office of the recorder of Allen county on the 16th day of January, 1872; and these defendants admit that said John H. Barnett died on the — day of February, 1872, testate, and by his said will nominated said A. G. Barnett his executor, and that said Abraham G. Barnett did not take out any letters testamentary as executor of said will or file any bond, but these defendants deny that he settled the estate of said John H. Barnett, but that they admit that he did, without any authority whatever, of his own wrong, proceeded to collect some money due to said testate at his death and some rents accruing upon his real estate after he died, all of which was done within fifteen months after his said testate's death, after which said A. G. Barnett never further interfered with said estate; and these defendants are informed and believe that said will gave said Barnett
no authority whatever to administer upon said estate without
213 procuring letters testamentary to issue duly to him upon said
will and giving bond as such executor for the faithful per-
formance of his duties as such; and these defendants admit that said Rudisill and wife did execute to said A. G. Barnett a mortgage as in said bill alleged and on the property therein described.

And these defendants expressly deny that they ever claimed, nor do they now claim, that said mortgage so executed to said Abraham G. Barnett created or does create a valid lien on the property described therein in their favor, nor do they nor have they ever claimed that by and on account of the breach of the condition in said bond that a right of action has accrued to them or either of them to enforce said mortgage so executed to said Abraham G. Barnett, nor have they or either of them ever claimed a right of foreclosure of said last-named mortgage for any such or any other purpose, and they expressly deny that they or either of them have, or are, or is aiding or abetting the said George P. Bissell in foreclosing said mortgage last mentioned for any purpose whatever, and if said Bissell is so seeking a foreclosure thereof he is acting so in said matter without the consent or procurement or concurrence of these defendants. And they aver that they are the devisees of the property mortgaged to said Bissell to secure said $8,000, and that the said mortgage so executed to said John H. Barnett is ample security
for the payment of said sums secured by it, but said mort-
214 gage so executed to said A. G. Barnett is worthless as a
security for said sum, and that these defendants never knew

of the execution of said last-named mortgage until long after the commencement of this suit.

And as to all said matters set forth in said bill of complaint in regard to said mill and dam and race and the danger thereto these defendants have no knowledge whatever, and are advised it is not necessary for them to further answer.

All which matters and things these defendants are ready to aver and prove as this court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

MARY A. WALL,
SUSAN B. SHOAFF,
By NINDE & ELLISON,
Their Solicitors.

THE STATE OF INDIANA, *Allen County:*

Personally appeared before me, the undersigned notary public within and for said county, the above-named Susan B. Shoaff, and being by me duly sworn says the above matters and things averred and set forth in the above and foregoing answer, so far as the same are set forth and averred as true within her own knowledge, are true in substance and fact, and so far as the same are set forth as true upon her information and belief, the same she has been informed were true and believes such information true; and further saith not.

215 SUSAN B. SHOAFF.

Subscribed and sworn to before me this 29th June, 1880. Witness my hand and notarial seal this day and year last above written.

[SEAL.] S. BRIEDENSTEIN,
Notary Public, A. C.

STATE OF MISSOURI,
City and County of St. Louis, } *ss:*

Personally appeared before me, the undersigned notary public within and for said city and county, the above named Mary A. Wall, who, being by me duly sworn, says the above matters and things averred and set forth in the above and foregoing answer, so far as the same are set forth and averred as true within her own knowledge, are true in substance and in fact, and so far as same are set forth as true upon her information and belief, the same she has been informed were and are true, and she believes such information true; and further saith not.

MARY A. WALL.

Subscribed and sworn to before me this 2nd day of June, 1880. Witness my hand and notarial seal on the day and year last above mentioned.

My commission will expire January 26th, 1882.

[SEAL.] JULIUS ROBERTSON,
Notary Public, St. Louis, Mo.

And at the same time the complainant, by Coombs, Morris & Bell, his solicitors, files his answer to the cross-bill of Simons and Bass in the words following, to wit:

216 The answer of George P. Bissell, complainant, to the cross-bill of Oscar Simons and John H. Bass, cross-complainants.

The said George P. Bissell, for answer to said cross-bill or to so much and such parts thereof as he is advised that it is material or necessary for him to answer unto, answering saith: He admits that the said Henry J. Rudisill and wife executed the mortgage to the said Elizabeth Rudisill in said cross-bill mentioned upon the lands therein described at the time and for the purpose stated in said cross-bill, and that the same was assigned to said cross-complainants as stated in said cross-bill, but he has no knowledge, information, or belief whether anything or how much is due on said mortgage for unpaid annuities, and therefore requires strict proof of the amount now due thereon; he also admits that the said Henry J. Rudisill and wife conveyed to the said John E. Hill the undivided half of the land described in said cross-bill at the time therein stated; he also admits that the said Henry J. Rudisill and wife executed to the said John H. Barnett a bond in the penal sum of ten thousand dollars, conditioned as in said cross-bill stated, but he denies that said sum of $5,000 therein mentioned was loaned or advanced by said John H. Barnett and Abraham G. Barnett to said Newton B. Freeman, as stated in said cross-bill, or that said bond was executed by said Rudisill as surety for said Freeman, as therein alleged.

The said George P. Bissell also admits that said John H. 217 Barnett died testate, that his will was probated, and that said Abraham G. Barnett was named in said will as executor thereof, and that he never qualified as such executor, but he denies that the said Abraham G. Barnett had any authority as executor or otherwise to settle the estate of said John H. Barnett or in any manner to meddle therewith.

The said George P. Bissell further admits that the said Henry J. Rudisill and wife executed a mortgage to the said Abraham G. Barnett on the mill property, as described in said cross-bill, at the time therein alleged, but he denies that he ever claimed any interest therein other than as stated in his bill of complaint in this behalf.

And the said George P. Bissell, having answered all of said cross-bill material or necessary for him to make answer unto, prays to be hence dismissed with his reasonable costs.

COOMBS, MORRIS & BELL,
Solicitors for Complainant.

And, at the same time, upon motion, it is ordered that the cross-bill of Elizabeth Rudisill be, and the same is hereby, dismissed.

And now, on this 27th day of January, 1881, comes the receiver, George H. Wilson, and files his report as such receiver, which report is by the court approved; and it is ordered that the amount advanced to said receiver by Oscar A. Simons and John H. Bass, and expended by said receiver in repairs on the mill property herein, to

wit, the sum of $2,851.86, be, and the same is hereby, declared
218 a specific lien in favor of said Simons and Bass upon the
property affected by said repairs, and known as the St. Joe
mill property, and to be more fully described in the final decree to
be entered herein.

And afterwards, to wit, at the November term of said court, on the 10th day of February, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

The above-entitled cause coming up for hearing upon the stipulation of the parties, by their respective solicitors, as follows, to wit:

That the cause be submitted to the court upon the bill, answers of
the defendants, Simons, Bass, Burgess, and the heirs of John J.
Kamm, and the answers of the Barnetts and Shoaffs, and replications
thereto, and the cross-bill of the Barnetts and Shoaffs, and the
plea of A. G. Barnett, and answers of Bissell, Simons, Bass, Burgess,
and the Kamms thereto, with all exhibits, and the replications to such
answers, and the proofs taken; that upon such hearing the court shall
enter an interlocutory decree, declaring the rights of the parties
under the pleadings and evidence above mentioned, with leave to
the defendants, Simons, Bass, Burgess, and the heirs of Kamm
thereafter to file a cross-bill, if they desire so to do, without process,
and take proofs of matters embraced in it, under the practice of the
State courts of Indiana, and answers to it, and also with leave to
any of the other defendants to file any further pleadings
219 necessary to a full determination of the cause, which, in the
case of merely final pleadings, shall be done as of a date prior
to the submission; that complainant may file any formal pleadings
necessary, and take and file any formal proof, after which the cause
shall be finally heard upon the cross-bill of Simons and Bass, and
the cross-bill of Simons, Bass, and Burgess and the Kamms, if filed,
and such other pleadings as shall be filed, and a final decree entered
accordingly, all of which shall be done within forty days after the
entry of such interlocutory decree, unless further time be given for
cause shown.

Thereupon depositions were read in evidence, as follows, to wit:

Depositions of David C. Fisher, Warren H. Withers, John E. Hill, and Henry Tons, witnesses produced and sworn before me, a notary public, at Fort Wayne, in Allen county, State of Indiana, on the 5th day of June, 1880, pursuant to agreement of counsel.

These depositions were taken on the part of the complainant in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is complainant, and Abraham G. Barnett *et al.* are defendants.

The said David C. Fisher, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by W. H. Coombs, Esq.:

220 Q. 1. State your name, age, residence, and occupation.

A. My name is David C. Fisher; age, 36 years; residence, Fort Wayne, Indiana, and am engaged in the real estate, insurance, and loan business.

Q. 2. How long have you resided in Fort Wayne; in what business have you been engaged, and for how long a time?

A. I have resided here about 15 years; I have been engaged in the insurance, real estate, and loan business during the entire time of my residence here.

Q. 3. How long have you been engaged in business for yourself, and how long were you acting for others, and for whom?

A. I have been engaged for myself since the 1st day of March, 1875; previous to that time I was in the employ of John Hough.

Q. 4. Are you acquainted with the complainant in this suit and George P. Bissell & Co.; and, if so, where do they reside?

A. Yes, sir; I am; George P. Bissell & Co. reside in Hartford, Connecticut, and have resided there for the past 15 years.

Q. 5. Who was their agent in Fort Wayne up to the time of the death of John Hough, and who has been acting for them since his death?

A. Mr. John Hough was their agent from about January 1st, 1865, up to the time of his death, January 30th, 1875, and Fisher & Tons have been acting as their agent since the death of Hough.

221 Q. 6. Was you present during the negotiation for the loan from George P. Bissell & Co. to John H. and Abraham G. Barnett, or at the time of its consum-ation?

A. I think I was.

Q. 7. Do you recollect who made the first proposition for the loan?

A. I do not.

Q. 8. The complainant now produces the original mortgage from John H. Barnett to George P. Bissell, trustee; the original bond from Henry J. Rudisill to John H. Barnett, both dated July 15th, 1869, and the original mortgage from Henry J. Rudisill and wife to John H. Barnett, dated December 13th, 1871, which are admitted as the originals of the copies on file as exhibits in this case, and asks the witness who executed the same.

A. The mortgage of J. H. Barnett to George P. Bissell, trustee, dated July 15, 1869, was executed by John H. Barnett in my presence, and acknowledged by him before me.

Q. 9. Look at this bond of Henry J. Rudisill and say who wrote the body of the bond and who executed it, and at what time, if you know.

A. The bond was written by Mr. John Hough and executed by Henry J. Rudisill, I think, in my presence on July 15th, 1869.

Q. 10. What security, if any, was Henry J. Rudisill to give to secure the performance of that bond?

A. I understood that Mr. Rudisill was to give Mr. Barnett a mortgage on his mill property to secure the performance of said bond.

222 Q. 11. Look at this mortgage from Henry J. Rudisill and wife to John H. Barnett, dated December 13th, 1871, and state who filled up the mortgage, who executed it, and before whom it was acknowledged, if you know.

A. The mortgage was filled up by me, executed by Henry J. Rudisill and wife, and acknowledged before me as a notary public on the 13th day of December, 1871.

Q. 12. Who furnished you with the description of the property as written in said mortgage?

A. I think Mr. Rudisill gave the description to Mr. Hough and Mr. Hough gave it to me.

Q. 13. What, if anything, did Mr. Rudisill say at the time about what property was included within that description?

A. To the best of my knowledge he was to mortgage the mill property and about 12 or 13 acres of land that the mill was situated upon.

Q. 14. When and how did you first discover that the description in said mortgage did not include Rudisill's mill building?

A. I discovered it about the time this suit was brought; Mr. Barnett informed me of it and then we went over and looked at it, paced off the ground, and found the mill just over the line.

Q. 15. Do you know any reason why this mortgage was not executed at an earlier date? And, if so, please state the reason.

A. I do not; I know that Mr. Rudisill promised to execute it, and Mr. Hough went to him a great many times to get him to execute it.

223 Q. 16. Who had the possession of this Rudisill bond from the time of its execution until the execution of the mortgage to secure it?

A. I think Mr. Hough held possession of it.

Q. 17. Have you any knowledge of an entry on the record of this Rudisill mortgage by Abraham G. Barnett, pretending to release a portion of the land mortgaged; and, if so, when did you first have knowledge of it?

A. No, sir; I have no record of any such thing.

Q. 18. Was you, or was you not, informed by one of Bissell's attorneys, about the time this suit was brought, that there was such a release upon the record of said mortgage?

A. Yes, sir; I was. I was informed that A. G. Barnett had released the mortgage.

Q. 19. Had you any knowledge of such release prior to that time?

A. No, sir; I had not.

Q. 20. The complainant now produces a mortgage from Henry J. Rudisill and wife to Abraham G. Barnett, dated January 23rd, 1875, and asks the witness if he ever saw the mortgage before this time.

A. No, sir; I do not think I ever saw this mortgage before.

Q. 21. Did you ever hear that such a mortgage had been executed; and, if so, when, and by whom was you so informed?

A. Yes, sir; I had about the time this suit was commenced.

Q. 22. If you ever heard of it before that time, state how you heard of it.

A. No, sir; I never had.

224 Q. 23. How long was John Hough confined to his bed during his last sickness, how often did you see him, and what was his condition on the 23rd of January, 1875, and from that time until his death?

A. John Hough was sick about two weeks. I saw him several times each day. On the 23rd of January he was very low, considered very dangerously sick, and continued in that condition up to the time of his death.

Cross-examination by Hon. R. S. TAYLOR:

Q. 24. By whose direction did you write the mortgage from Rudisill and wife to J. H. Barnett?

A. By the direction of John Hough.

Q. 25. Where did you write it?

A. I think in Mr. Hough's office.

Q. 26. Did you follow in writing the mortgage the description of the property furnished to you by Mr. Hough?

A. I think I did.

Q. 27. Were you present when Mr. Rudisill furnished Mr. Hough with the description?

A. I could not say positively that I was.

Q. 28. You were at that [time] in the employ of Mr. Hough as clerk and book-keeper, were you not?

A. Yes, sir; I was.

Q. 29. And all that you did at that time in this matter was wholly by his direction, was it not?

A. Yes, sir.

Q. 30. Have you, since the death of Mr. Hough, been yourself the agent at Fort Wayne of George P. Bissell and George P. Bissell & Co.?

225 A. Fisher & Tons have been their agents, although I have personally attended to all their business. The firm of Fisher & Tons is composed of myself and Henry Tons.

Q. 31. Had George P. Bissel or George P. Bissel & Co. any notice at the time that Henry J. Rudisill had executed his said bond to J. H. Barnett?

A. No, sir; I think not.

Q. 32. Did you, as agents for George P. Bissell, place the mortgage of J. H. Barnett and bonds of J. H. and A. G. Barnett to George P. Bissel & Co. in the hands of the attorneys for the plaintiff in this cause for collection?

A. Yes, sir; I did.

Q. 33. Did you, as such agent, place in their hands, to be used for the benefit of George P. Bissell, the bond of H. J. Rudisill and his two mortgages to secure it?

A. No, sir; I did not.

Q. 34. Have you been authorized by George P. Bissell to recognize in any manner the bond of H. J. Rudisill, or either of the mortgages made by him to secure it, as securities to him, or take any steps to enforce them for his benefit?

A. I think not.

Q. 35. Who has paid the interest on the bonds of J. H. and A. G. Barnett to George P. Bissell & Co?

A. Mr. A. G. Barnett has generally paid the interest.

Q. 36. Has any one except A. G. Barnett ever paid any of said interest to Bissell & Co.; if so, who?

A. I collected the interest once of John E. Hill, Jr., and probably once from Freeman & Barnett. The said payments were made by him for A. G. Barnett.

226 Q. 37. By whose direction did you collect those payments from John E. Hill and Freeman & Barnett?

A. By the direction of A. G. Barnett.

Q. 38. Did you have to call on Mr. Hill more than once for the money?

A. I do not recollect whether he paid it into the office or whether I called on him for it.

Q. 39. What means did you use to induce him to pay?

A. I don't know. The interest was delinquent every time it was due. I think it was paid promptly the first years, but during the last years it was delinquent.

Q. 40. Did you collect interest from Mr. Hill more than once?

A. I think not.

Q. 41. Can you tell the date of that payment?

A. I cannot.

Q. 42. Was it after John E. Hill, Jr., had purchased the mill property from Rudisill?

A. I think it was before 1875?

Q. 43. Was it before or after Henry J. Rudisill went to California?

A. I think it was since Henry went to California, although I said before that I thought it was before 1875.

The further taking of these depositions is now adjourned to June 8th, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 8th day of June, 1880, the further taking of these depositions is proceeded with, as follows:

Re-direct examination:

227 Q. 44. Did you, as the agent of Bissell, before the commencement of this suit have any conversation with Coombs, Morris & Bell, or either of them, in reference to the propriety or impropriety of suing upon the Rudisill mortgage or claiming the benefit of it for Bissell; and, if so, what conclusion was arrived at?

A. Yes, sir; I did. I consulted with Mr. Coombs, I think, in regard to it, and he informed me Mr. Bissell had an interest in the Rudisill mortgage. I informed him then that the Rudisill mortgage should be foreclosed in connection with the Barnett mortgage.

DAVID C. FISHER.

The said WARREN H. WITHERS, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Direct examination by W. H. COOMBS, Esq.:

Q. 45. Are you related to Henry J. Rudisill and Elizabeth Rudisill, his mother; and, if so, how?

A. Elizabeth Rudisill is my wife's mother and Henry J. Rudisill is her brother.

Q. 46. When did Henry J. Rudisill leave this county, and where did he go, and where does he now reside?

A. He left here about five or six years ago, I think. He went to California, where he now resides.

Q. 47. What, if you know, were his pecuniary circumstances at the time he left?

A. He was considerably in debt. All, I think, that he owned was encumbered. I think he took no property or means with him, 228 and that his property left here has or will pay the liens thereon, with one exception.

Q. 48. Had you personal knowledge of the execution of a mortgage from Henry J. Rudisill and wife to A. G. Barnett on his mill property purporting to be security for the payment of $5,000 loaned from Bissell to the Barnett brothers?

A. I cannot say that I now have any recollection of the execution of such mortgage, yet I know that such an one was executed and that it was written by and acknowledged before me, and I now hold the mortgage in my hand.

Q. 49. Was that mortgage executed before or after Rudisell left this country?

A. It was executed a short time before he left.

Q. 50. What property, if any, did he leave other than the property in controversy in this suit; and, if he left any, what has become of it?

A. All the property owned by him at the time he left, aside from that in controversy (I mean the mill), was that portion of the home farm lying west of the canal feeder, upon which there was a mortgage for some $12,000, which, I understand, has since been sold on foreclosure in the latter part of 1877, not redeemed, and the title made to the purchaser. The exception referred to in my answer to question No. 47 is that of a foreclosure of a mortgage executed by Rudisill to C. F. Pfeiffer, in which the land sold for some $2,000 less than the debt, and on which there is judgment over against him.

Q. 51. You was the attorney for Elizabeth Rudisill in this case, was you not?

229 A. Yes; I was attorney for her, but am not now.

Q. 52. Has she sold her interest in the mill property since the commencement of this suit; and, if so, to whom, and for how much?

A. She has sold her interest to Oscar A. Simons and John H. Bass, for which she received something near $4,000, and is to receive $800 per annum, payable quarterly, during her natural life. I think the sale was made in October, 1879.

Q. 53. Do you know how much was due her for unpaid annuities at the time of said sale; and, if so, how much was due her?

A. The amount paid her, as I said before, was about $4,000.

Cross-examination by Hon. R. S. TAYLOR:

Q. 54. You may state exactly what amount of annuities payable under the mortgage executed by Henry J. Rudisill and wife have not been paid by Henry J. Rudisill, giving the date of each unpaid installment.

A. There was due and unpaid from Henry J. Rudisill to Mrs. Elizabeth Rudisill on her annuity on the 29th day of October, 1879, the sum of $3,608. This included the annuity to December 31, 1879.

Q. 55. What is the present age of Elizabeth Rudisill and the character of her constitution and health?

A. She is in her 75th year, I think; will be 75 on the 29th day of November, 1880. She is a woman of naturally robust constitution, and has generally enjoyed good health, but during the 230 past winter suffered a severe illness, from which she has now, we hope, recovered.

W. H. WITHERS.

And now the further taking of these depositions is adjourned to the 15th day of June, 1880.

GEO. D. CRANE, *Notary*.

And now on this 15th day of June, 1880, the taking of these depositions is proceeded with as follows:

The said DAVID C. FISHER, being recalled, deposes as follows:

Examined by W. H. COOMBS, Esq.:

Q. 56. The complainant now produces eight bonds for the sum of $1,000 each, with two coupons attached to each for $45.00 each, dated July 15, 1869, which are marked Nos. 1, 2, 3, 4, 5, 6, 7, & 8, and signature of notary, for identification, and the witness is asked whether he saw them executed, and, if so, by whom.

A. I saw them executed by John H. and Abraham G. Barnett.

Examined by S. R. ALDEN, Esq.:

Q. 57. You may state whether you saw Henry J. Rudisill sign a certain bond which you have heretofore testified in your examination by the complainant was written by John Hough.

A. Yes, sir; I did.

Q. 58. Where did he sign it?

A. In John Hough's office.

Q. 59. Who was present at the time?

A. John Hough, Rudisill, and myself.

Q. 60. What, if anything, was said by Mr. Rudisill at the time of signing the same?

A. I don't recollect.

231 Q. 61. Was this bond executed at the same time with a certain mortgage to John H. Barnett by Henry J. Rudisill and wife, to the execution of which you have heretofore testified?

A. No, sir; it was not.

DAVID C. FISHER.

The further taking of these depositions is now adjourned to June 16, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 16th day of June, 1880, the taking of these depositions is proceeded with, as follows:

The said John E. Hill, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Q. 62. Have you ever paid any interest to George P. Bissell, or George P. Bissell & Co., on an $8,000 loan made by them to John H. and A. G. Barnett; and, if so, how much, at what times, and for whom were the payments made?

A. No, sir; I never did.

Q. 63. Have you ever paid any interest on a loan made by George P. Bissell & Co. to J. H. & A. G. Barnett?

A. Yes, sir.

Q. 64. At what time or times, and how much have you paid, and for whom were the payments made?

A. I do not remember the dates; it was after the failure of Freeman & Barnett, I think; I made three payments of $225.00 each; I do not know who they were made for; I charged them to Henry J. Rudisill.

232 Q. 65. At whose instance or request did you make these payments?

A. Henry J. Rudisill requested me to make the first one.

Cross-examined by S. R. Alden, Esq.:

Q. 66. State what Henry J. Rudisill said to you about paying any interest.

A. He said the interest on the Bissell mortgage was due, and the mortgage was liable to be foreclosed, and I had better pay it.

J. E. HILL.

And now the taking of these depositions is adjourned to June 23rd, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 23rd day of June, 1880, the taking of these depositions is proceeded with, as follows:

The said HENRY TONS, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by W. H. COOMBS, Esq.:

Q. 67. Are you one of the firm of Fisher & Tons, agents for George P. Bissell in the collection of interest on mortgages held by him?

A. Yes, sir.

Q. 68. When did you first learn that part of the land mortgaged
by Henry J. Rudisill and wife to John H. Barnett, to secure part of
the loan from George P. Bissell & Co. to J. H. & A. G. Barnett, had
been released by Abraham G. Barnett, as executor of J. H. Barnett,
on the margin of the record of said mortgage, and that a
233 new mortgage had been executed by Rudisill and wife to A.
G. Barnett on Rudisill's mill property to secure the same
debt?

A. I do not know anything about that transaction.

Q. 69. Did you ever hear of such a pretended release or such a mortgage upon Rudisill's mill property before the commencement of this suit last summer; and, if so, when?

A. No; I don't recollect having ever heard of it.

Cross-examination by S. R. ALDEN, Esq.:

Q. 70. Did you ever know, prior to the commencement of this suit, anything of the existence of any such mortgage or mortgages purporting to have been executed by Henry J. Rudisill and wife on the mill property, or any other property, in favor of either of the Barnett brothers?

A. I did not.

HENRY TONS.

STATE OF INDIANA, } *ss:*
Allen County, }

I, George D. Crane, a notary public within and for said county
and State, hereby certify that the above-named David C. Fisher,
Warren H. Withers, John E. Hill, and Henry Tons were by me duly
sworn according to law to testify the truth, the whole truth, and
nothing but the truth relating to said cause; that their depositions
were reduced to writing by me; that the said defendants Simons,
Bass, Burgess, Shoaff, and Kamm attended, by their respective attorneys,
and said depositions were taken at the office of Coombs,
Morris & Bell, in the city of Fort Wayne, county of Allen, State of
Indiana, on the 5th day of June, 1880, and subsequent days,
234 as shown by the adjournment orders therein, between the
hours of 8 a. m. and 6 p. m. of said days.

In testimony whereof I have hereunto set my hand and notarial seal this 23rd day of June, A. D. 1880.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

Depositions of Newton B. Freeman, Warren H. Withers, Abraham G. Barnett, Oscar A. Simons, Charles A. Zollinger, John E. Hill, Henry Burgess, witnesses produced and sworn before me, a notary public, at Fort Wayne, in Allen county, State of Indiana, on the 1st day of June, 1880, pursuant to agreement of counsel.

These depositions were taken on the part of the defendants, Oscar A. Simons, Bass, Burgess, and the Kamms, in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is complainant and Abraham G. Barnett *et al.* are defendants.

The said NEWTON B. FREEMAN, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Hon. R. S. TAYLOR:

Q. 1. State your name, age, residence, and occupation.

A. My name is Newton B. Freeman; age, 55 years; reside at Fort Wayne, Indiana, and my occupation is commercial traveler.

Q. 2. State whether or not you are acquainted with the parties to this action.

235 A. I am not acquainted with the complainant, but know most of the defendants.

Q. 3. State whether or not, in July, 1869, you were a member of the firm of Freeman & Barnett, paper manufacturers; and if so, state who the other members of the firm were.

A. I was, and I think Abraham G. and J. H. Barnett were the other members of the firm. On reflection, I think J. H. Barnett was not a member of the firm, but the firm was at that time composed of N. B. Freeman, A. G. Barnett, and Samuel Bard; J. H. Barnett became a member after that time by purchasing the interest of Mr. Bard; the date of that purchase I cannot fix.

Q. 4. Did you know at the time, of a loan of money made by J. H. and A. G. Barnett, from George P. Bissell & Co.? And if so, state what part you had in the transaction, if any, and all you know about it.

A. I know of the making of the loan. I know of the loan, $5,000 was for Rudisill, and $3,000 was for Barnett; the loan was for $8,000. The $5,000 was to be used by me in the business—was placed to my credit on the books of the firm of Freeman, Bard & Barnett.

Q. 5. Was there any conversation between you and A. G. & J. H. Barnett, or either of them, before the making of said loan, on the subject?

A. I think there was.

Q. 6. You may state the substance of such conversation or conversations?

A. We agreed that it was necessary to have more money in our
business. Barnett was behind [on] his share, and I was behind
236 on my share; Bard, I think, had nearly paid up his share.
This loan was made to make our shares equal; I had no way
of raising money myself, and Henry J. Rudisill agreed to raise the
$5,000 for me. I do not remember all that was said.

Q. 7. Was it, or was it not, understood between you and A. G. and J. H. Barnett, before the making of said loan, that the whole sum was to be invested in the business—$3,000 to go to the credit of Barnett and $5,000 to your credit?

A. Yes; it was so understood.

Q. 8. With whom was the loan negotiated on behalf of Bissell & Co.?

A. John Hough.

Q. 9. Were you present at any of the negotiations with Mr. Hough for the loan?

A. I was not.

Q. 10. Who received the money when the loan was consum-ated?

A. I think A. G. Barnett.

Q. 11. What was done with it?

A. It was used to pay debts of the firm, and in the business.

Q. 12. Did any portion of said loan of $8,000 pass into the hands Henry J. Rudisill?

A. Not any.

Q. 13. Were you cognizant at the time of the execution of a bond by Henry J. Rudisill to J. H. Barnett, to secure the payment of a portion of said loan? And if so, state what was the consideration of that bond.

A. I think about that time, or not long after, Henry J. Rudisill
executed a mortgage to Barnett, on what he called his mill
237 property, for the amount of the $5,000 that Barnett borrowed
from Bissell for me.

Q. 14. Was the said mortgage given by said Rudisill to secure any debt of his own, or was it as security for you?

(Objected to by complainant.)

A. It was for security for me.

Q. 15. By whom was the interest paid on the debt to Bissell?

A. Paid by the firm of Freeman & Barnett, I think, as long as they continued in business. I do not know how the interest has been paid since that time. On reflection, I think I paid one amount of interest since we quit business, but do not know what it was. Freeman & Barnett quit business in 1877.

Q. 16. After the death of John H. Barnett, who took possession and charge of his estate?

A. His brother, A. G. Barnett.

Q. 17. What authority and power did he assume and exercise over it?

A. The will of J. H. Barnett made A. G. Barnett his executor, I believe; and I believe he took full charge of all his affairs.

Q. 18. Were you acquainted with the sisters of J. H. Barnett, Mrs. Wall and Mrs. Shoaff, and the sons of A. G. Barnett, Byron H. and James W.?

A. Yes.

Q. 19. Was there ever, to your knowledge, any objections made by either of said persons or by any of the debtors or creditors of J. H. Barnett to the acts of A. G. Barnett in the control and management of the estate of J. H. Barnett? And, if there was any such objections, state by whom *it* was made.

238 A. I never heard of any.

Cross-examination by W. H. Coombs, Esq.:

Q. 20. Did you give the Barnetts, or either of them, any note, bond, or security for the $5,000 you say you received?

A. I did not.

N. B. FREEMAN.

The further taking of these depositions is now adjourned to June 2nd, 1880.

June 1, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 2nd day of June, 1880, the taking of these depositions is proceeded with as follows:

The said Warren H. Withers, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Hon. R. S. Taylor:

Q. 21. State your name, age, residence, and occupation.

A. My name is Warren H. Winters; of lawful age; reside in Fort Wayne, Indiana, and by occupation an attorney-at-law.

Q. 22. Were you acquainted with John H. Barnett in his lifetime, and with his brother, A. G. Barnett, and N. B. Freeman?

A. I was acquainted with all of them.

Q. 23. State what were the relations between John H. and A. G. Barnett—how they lived, what degree of trust and confidence was reposed by J. H. Barnett in his brother?

A. They were brothers; they lived together with their mother to the time of her death, and together afterwards until the time of the death of John H. Barnett. In his later years John H.
239 paid very little attention to any kind of business; their entire business developed upon and was managed by A. G., except that during a portion of the time that they were in the paper mill John H. worked at and assisted in the mill. John H. was a single man; never married; lived and died in the house of his brother, A. G.

Q. 24. Were there any other sisters or brothers? And, if so, state who they were.

A. There were no other brothers than A. G.; there were two sisters, Mrs. Watson Wall and Mrs. John A. Shoaff.

Q. 25. What were the relations of J. H. Barnett towards A. G. Barnett in respect to personal trust and confidence?

A. Their relations were peculiarly friendly and affectionate, and in every respect John H. reposed the most implicit confidence in A. G.

Q. 26. State what is the fact as to whether or not this relation of trust and confidence was known to the other members of this family

A. I have no doubt it was; I think it was.

Q. 27. Were you cognizant before and at the time it was made of the making of a loan by J. H. and A. G. Barnett from George P. Bissell? And, if so, state what you know about it, by whom the money was borrowed, and by whom used.

A. I know, as a matter of information, that the Barnetts made a loan from Bissell of, I think, $8,000, $5,000 of which was for the benefit of N. B. Freeman, and which was put in the paper-mill firm to his credit. I do not know by whom or for what purpose the $3,000 was used. My information is from the Barnetts and N. B. Freeman.

240 Q. 28. What were your relations at that time with J. H. and A. G. Barnett, and how fully, if at all, did they talk with you about their business, and particularly about said loan?

A. My relations with the Barnetts were very friendly. John H., to some extent, and A. G. freely and generally, consulted with me in regard to all of his business, and I felt and always took great interest in them. A. G., for a number of years, was a clerk in the public office I then held, and while an officer himself his and my offices were in the same room.

Q. 29. What information, if any, did you receive from J. H. Barnett in relation to said loan from George P. Bissell & Co., and the purpose for which it was made?

A. I received the information stated in my answers to previous interrogatories. I received but very little of my information from John H. Barnett; it principally came from A. G.

Q. 30. State what, if anything, was told to you in relation to the making of said loan by A. G. Barnett.

A. A. G. Barnett informed me that N. B. Freeman was unable to furnish his share of the money necessary to make his one-third of the capital stock in the paper mill; that they borrowed the money from Bissell for the purpose of furnishing $5,000 for that purpose, and were to have a mortgage upon Henry J. Rudisill's property to indemnify them against the payment of the same, or the interest to accrue thereon.

Q. 31. After the death of J. H. Barnett, who took possession and control of his estate?

241 A. A. G. Barnett.

Q. 32. What degree and kind of authority did he assume and exercise, and what did he do with the property of the estate?

A. He was named in the will of John H. Barnett as executor, and as such effected to control it; he made no change that I have any information of, but in one item.

Q. 33. What did he do in respect to the partnership business in which J. H. Barnett had been engaged?

A. He with N. B. Freeman continued it until they went into bankruptcy, I think, some time in 1877.

Q. 34. What control, if any, did he take and exercise over the real estate of J. H. Barnett?

A. He took and exercised the same control he had exercised for years before the death of John H. ——, which was as if he had owned it himself.

Q. 35. What acts did he do in respect to the renting of said real estate and the collection of rents?

A. He rented what property there was to rent, collected the rents, as a rule, and paid all taxes and assessments upon the property as if he owned it.

Q. 36. What authority and control did said A. G. Barnett assume and exercise over the personal estate of said J. H. Barnett?

A. The same authority and control as to the real; I think he had no personal estate outside of his clothing and his interest in the paper mill.

Q. 37. Do you know anything in relation to his purchase of a lot
in the cemetery and the removal of the remains of his pa-
242 rents to it and the erection of a monument over them. If so,
state fully.

A. I know that that was done, but whether by both together or by A. G. alone, I cannot state.

Q. 38. Were any objections made by the sister of J. H. Barnett or any of his heirs or legatees, or any of the debtors or creditors of his estate to the exercise by A. G. Barnett of the powers of executor and trustee in respect to the estate of J. H. Barnett; if so, what, or by whom?

A. None that I ever knew or heard of.

Q. 39. State whether or not the heirs and legatees of J. H. Barnett knew of the acts and doings of said A. G. Barnett in relation to the estate.

A. I cannot say whether they did or not.

Q. 40. Where did the sisters of J. H. Barnett reside at the time and after his death?

A. Mrs. Shoaff resided in Fort Wayne; Mrs. Wall, I think, in St. Louis, Mo.

Q. 41. State what the fact is as to whether or not A. G. Barnett was recognized and treated by all persons interested in the estate of J. H. Barnett, and the public generally, as executor and trustee under the will of J. H. Barnett?

A. So far as I know or have any information, he was.

Q. 42. Did you have any knowledge at the time of the execution of a mortgage to A. G. Barnett by Henry J. Rudisill in his will, after the cancellation of a prior mortgage given to J. H. Barnett, and if so, state what you knew about [it]?

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A. I have now no personal recollection of the execution of the mortgage.

243 Q. 43. Did you know at the time of the execution of a mortgage by Henry J. Rudisill to John H. Barnett, to secure a bond previously made by him to said Barnett? and if so, state what you knew about it.

A. I knew that a mortgage was executed by Rudisill and his wife to Barnett to indemnify him against the payment of $5,000 of the money borrowed from Bissell and the interest thereon.

Q. 44. What do you know as to the procurement of said mortgage; by whom was it done?

A. It was procured by A. G. Barnett.

Q. 45. You may state fully all you know as to the time that elapsed after the execution of said bond before the execution of said mortgage, and the circumstances attending its execution.

A. I do not know what time elapsed between the execution of the bond and the mortgage I have spoken of, but think the mortgage was not executed for a long time after the money was borrowed; I think more than a year, and, perhaps, more than two years. At the time the $5,000 was borrowed by the Barnetts from Bissell and credited to Freeman, in the paper mill, Rudisill agreed to execute a mortgage to indemnify Barnett against the payment of the money to Bissell, but think the mortgage was not actually executed until long afterwards, as I have said.

Q. 46. At whose solicitation was it then done?

A. It was done at the solicitation of A. G. Barnett.

Q. 47. From what source do you derive your information as to the existance of an agreement on the part of Rudisill, at the time the loan was made from Bissell, to make a mortgage?

244 A. It was derived from A. G. Barnett, N. B. Freeman, and Rudisil himself, and from other facts in relation to facts connected with the real estate on which the paper mill is situated, and the mill itself, within my own knowledge.

Q. 46. State what agency, if any, you had yourself in procuring the execution of said mortgage from Rudisill to John H. Barnett.

A. No other than that I knew it was to have been executed, and very many times spoke to A. G. Barnett about it and urged him to see to it that it was done.

Q. 47. What was the condition at that time of Henry J. Rudisill's financial affairs, and what change had taken place, if any, within two years prior to that time? State also whether or not you had an intimate acquaintance with his financial situation?

A. At the time the money was borrowed I think Rudisill was abundantly solvent. From the manner in which he conducted his business, however, I feared he might not long continue so, and for that reason, and the anxiety that Barnett should be secured, I urged, as I have said, A. G. Barnett, to see to it that the mortgage was given. I was somewhat conversant with Rudisill's affairs.

Q. 48. What were the relations between N. B. Freeman and the Barnetts, both before and after the death of J. H. Barnett, in respect to intimacy of acquaintance, business relationship, and mutual confidence?

245 A. They were on very friendly terms, so far as I know or have any knowledge, both before the death of John H. Barnett, since, and now. These friendly relations extended to and included their business and personal relations.

Cross-examination by W. H. COOMBS, Esq.:

Q. 49. Where did George P. Bissell & Co. reside at the time this loan was consum-ated, and who were their agents in Fort Wayne to negotiate this loan?

A. My information was that Bissell & Co. resided in the State of Connecticut. The loan spoken of was negotiated, I think, through John Hough, who acted as their agent.

Q. 50. Was you present at any of the negotiations with Mr. Hough in relation to making this loan, or do you know personally anything about the negotiations with him for that purpose?

A. I was not present at any time that I can now call to mind. All that I know about the matter is derived from information.

Q. 51. How long can you say, from your personal knowledge, that A. G. Barnett continued in charge of and collecting the rent of the property mortgaged by J. H. Barnett to Bissell after the death of J. H. Barnett?

A. I can't say that I have any personal knowledge about the matter. I have spoken and now speak from my information and understanding of the matter.

Q. 52. Were not Mrs. Shoaff and Mrs. Wall married during all the time from the time this loan was made to the present time?

A. Mrs. Wall was, I know, and I think Mrs. Shoaff was also.

246 Q. 53. Were not the defendants, Byron Hueston and James William Barnett, minors at the time of the death of John H. Barnett, and are they not still minors?

A. They were and are still.

Q. 54. State any acts of management or control by A. G. Barnett of the real estate mortgaged to Bissell by J. H. Barnett after his death that came to your personal knowledge, and did not all such acts of control cease within one or two years after his death?

A. I have no personal knowledge of such control, and cannot say, therefore, when they began or ceased.

Q. 55. State any acts of control by A. G. Barnett after the death of J. H. Barnett of the property mortgaged to him, J. H. Barnett, by H. J. Rudisill. State such facts only as you have personal knowledge of.

A. I have no personal knowledge of any acts of control by A. G. Barnett as to that property.

Q. 56. Can you state any acts of control executed by A. G. Barnett over the personal estate of J. H. Barnett after his death? State only such as you have personal knowledge of.

A. I have no personal knowledge other than that I have spoken of in regard to the paper mill, it and its property being managed and controlled from the time of the death of John H. Barnett until their assignment in bankruptcy.

Q. 57. Was not this control of the paper mill as surviving partner of J. H. Barnett?

247 A. I presume it was.

Q. 58. Have you any personal knowledge of the public recognizing A. G. Barnett as executor of J. H. Barnett? If so, state how and in what particular.

A. I have no personal knowledge on the subject.

Q. 59. How did the defendants, Mary Wall and Susan Shoaff and Byron Hueston Barnett and James William Barnett, recognized the control of A. G. Barnett over the personal estate?

A. I have no knowledge as to how, if at all, they recognized such control.

Q. 60. State how said George P. Bissell or George P. Bissell & Co. recognized executorship of A. G. Barnett over his brother's estate or the validity of any acts he may have assumed to do as such executor. Please speak from your personal knowledge.

A. I have no personal knowledge on the subject.

W. H. WITHERS.

And the said ABRAHAM G. BARNETT, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by Hon. R. S. TAYLOR:

Q. 61. State your name, age, and residence, and the relation you were to John H. Barnett.

A. My name is Abraham G. Barnett; age, 47 years; reside at Fort Wayne, Indiana; I was a brother to John H. Barnett.

Q. 62. What business relations, if any, existed between you and John H. Barnett?

248 A. We were partners in everything but the paper mill. We had been living together during almost our whole life. He had his property, which he derived an income from, and I had mine.

Q. 63. Did you keep a separate account of expenses or pay them in common?

A. We paid them in common.

Q. 64. In what other matters were you partners?

A. The only thing in which we were in partnership was in a grocery store in 1856 & 1857.

Q. 65. What interest, if any, did he have in the paper mill?

A. He bought out Samuel Bard, who owned a one-third interest. He nor I never considered him as a partner; he just bought out that interest and let it lay there; he never took any part in the management of the business.

Q. 66. What were the relations between you in respect to mutual confidence and esteem?

A. I do not believe two brothers ever got along better.

Q. 67. To what extent did you transact business for him in his lifetime?

A. He had confidence in me, and he would sometimes tell me to collect his rents, and he would sometimes collect my rents.

Q. 68. Who conducted the negotiations for the loan of $8,000 from George P. Bissell—you or your brother?

A. It was Henry J. Rudisill and myself, and I think my brother was present at the time we first spoke to Mr. Hough for the loan.

249 Q. 69. Had there been any conversation previously between you and your brother and N. B. Freeman on the subject of a loan? If so, state what had been said and agreed between you.

A. I don't recollect ever having any conversation with Mr. Freeman. Mr. Freeman was behind with the firm, and Mr. Bard wanted to push him out, and Mr. Rudisill wanted to get money to help Mr. Freeman, and went with us to Mr. Hough to get a loan. The agreement was that John H. Barnett's two lots and Rudisill's mill property was to be mortgaged for the loan.

Q. 70. Was that agreement an agreement between you and your brother and Rudisill, or was it an agreement with Hough?

A. It was an agreement between myself, my brother, and Rudisill with Mr. Hough.

Q. 71 Begin at the beginning and state the transaction as it occurred. What understanding was there between you and your brother and Rudisill before you went to Hough as to the amount to be borrowed, and the use to be made of it, and the security to be given for it?

A. As I stated before, $5,000 Mr. Rudisill was to have, less the commissions paid to Hough, to make Mr. Freeman's interest equal to Bard's and mine. The amount was to be $8,000. The other $3,000 we were to use ourselves—that is, my brother and I. The security was to be the two lots of my brothers and the mill property of Rudisill.

Q. 72. Did you and your brother and Rudisill go together to Hough to solicit a loan for the amount you have named? And, if so, state first who was present and what was said and done.

250 A. I am certain that Rudisill and I went together to Mr. Hough, and I think my brother was present. I do not recollect that any one else was present. We asked for a loan for $8,000, and Hough said he would try and obtain it. We told him what security we would offer him. That is all I now remember that occurred at that time.

Q. 73. Did you have any subsequent conversation with Mr. Hough on the same subject; and, if so, who was present and what was said?

A. When he was ready to make out the bonds I asked him why Rudisill's name was not in. He stated that Rudisill was in such bad odor in regard to his own interest on loans he had made of Bissell that they did not wish to put his name in the bonds; that he would get up another bond and mortgage to secure the $5,000 that Rudisill was to get of this loan. I do not recollect who was present. I do not think my brother was present. I do not recollect any other person being present, but there might have been.

Q. 74. Did this conversation take place before or after you signed the bonds to Bissell?

A. It was about the time the bonds were signed. I can't tell whether it was before or after, but was probably before.

Q. 75. Did you have any conversation with Hough, at which Rudisill was present, after the one you have specified, at which you made application for the loan? If you did, state when it was and what was said and done.

251 A. I don't recollect of any after we had made the application.

Q. 76. Who received the money from Hough?

A. My brother and I. I do not know whether Rudisill was present or not, but think not; I will not be sure.

Q. 77. In what form did you receive the money—in currency or check?

A. I think that there was a draft sent to our order, and that we gave it to Mr. Hough. He took out his commissions, paid some claims in court, paid some prior liens on the property, and gave his check to us for the balance.

Q. 78. Who do you mean by "us?"

A. J. H. Barnett and myself.

Q. 79. What did you and your brother do with the money which you received on Hough's check?

A. There was very near $5,000 deposited to the credit of Mr. Freeman in the paper mill. He received $5,000, less the commissions, because by the orders of Mr. Rudisill it was to go to the credit of Mr. Freeman in the paper mill to make his interest equal to the other two partners, and the balance of the money received from Mr. Hough I do not now remember what was done with it. I suppose part of that went into the paper mill.

Q. 80. Did you receive the money the same day you signed the bonds?

A. I suppose we did. I can't say exactly, but suppose we did.

Q. 81. How soon after you signed the bonds to Bissell did Rudisill execute his bond to J. H. Barnett?

A. I cannot tell.

Q. 82. Were you present when the bond was signed?

252 A. I do not recollect.

Q. 83. Did you know anything about a bond being given at all?

A. Yes, sir.

Q. 84. What did you know about it?

A. I knew that Rudisill was to give a bond and mortgage bearing even date with that given by my brother and myself as security for the $5,000 above spoken of.

Q. 85. Do you know that he did give any such bond?

A. I do.

Q. 86. How do you know it?

A. Because it was in my house for a long time after it was recorded.

Q. 87. Who gave it to you ?

A. I don't know whether Rudisill gave it to my brother or whether he gave it to me, or whether Mr. Hough gave it to me.

Q. 88. How long did you have it in your possession ?

A. I can't say.

Q. 89. What did you do with it ?

A. I think I gave it to Mr. Coombs, but am not sure.

Q. 90. When did you give it to him ?

A. About the time this suit was commenced.

Q. 91. What did you give it to him for?

A. To foreclose.

Q. 92. How long after the execution of this bond was the mortgage securing it executed ?

A. I do not know.

Q. 93. Who procured the execution of the mortgage by Rudisill ?

253 A. I do not recollect at this time. He knew he was to give it. I may have urged him, or it may have been my brother, or Mr. Hough.

Q. 94. Did you ask him to execute the mortgage?

A. I suppose I did.

Q. 95. Who took possession of the mortgage after its execution?

A. I do not know, but think Hough did first, and then it was turned over to us.

Q. 96. What did you do with it?

A. It was recorded. I do not know whether Mr. Hough, Mr. Rudisill, or myself paid for recording it. I had it over at my house.

Q. 97. What did you do with it?

A. I gave it to Mr. Coombs.

Q. 98. When, and for what purpose?

A. About the commencement of this suit, and for the purpose of foreclosure.

The further taking of these depositions is now adjourned to June 3rd, 1880.

June 2, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 3rd day of June, 1880, the taking of these depositions is proceeded with, as follows:

Q. 99. What was the date of the death of John H. Barnett?

A. About the first of February, 1872.

Q. 100. What estate did he leave?

A. He left 14½ acres in Wells Reserve; the 20-feet lot on Calhoun street and the 50-feet lot on West Berry street; these two last being the property mortgaged to Bissell; also the interest he had bought of Mr. Bard in the paper-mill.

Q. 101. Did he leave any personal estate? If so, what?

254 A. He had about $125 to $130 in cash, and I think a small

amount of rents due him, not exceeding $100. That is all the personal estate that I now recollect that he had.

Q. 102. Did he owe any personal and individual debts? If so, what, and to whom?

A. He owed Mr. Glutting $10.00. I think he owed a note to a Mr. Cook for, say, $135.00; his doctor's bill and expenses of last illness, the amount of which I do not recollect.

Q. 103. Who took charge of his estate after his death?

A. I did.

Q. 104. What did you do with it?

A. I bought a lot in the cemetery; I bought a monument for my father and him and the rest of the children, according to instructions; had my father, mother, and the children removed to the Lindenwood Cemetery; paid Glutting; the doctor, his funeral expenses, and the city and county taxes, and the note of Cook. I do not think of any other debts that he had.

Q. 105. What amount did you pay out in the payment of his debts, excluding the cemetery lot, monument, and expenses of removing other members of the family to the new lot?

A. I have named all his debts, and paid just that amount, as near as I can recollect. I recollect no other debts beside what I have stated above.

Q. 106. You have not stated the amount of expenses of his last sickness, funeral expenses, or taxes. What did they amount to?

A. I do not now recollect.

255 Q. 107. Can you not make some approximation to it?

A. I should think about $300.00.

Q. 108. There was added to that about $135 to Cook and $10 to Glutting, making about $450 in all. Is that as near an approximation as you can make of the entire amount paid out by you on the debts of your brother?

A. That is as near as I can now recollect.

Q. 109. How much did you pay for the cemetery lot?

A. I think it was $400.00.

Q. 110. How much for the monument?

A. I think about $400.00.

Q. 111. How much for the removal of the remains of other members of the family to the new lot?

A. It was either $20 or $40; I have forgotten which.

Q. 112. That makes about $820 to $840 paid out in connection with the cemetery lot. Is that the total amount, as near as you can tell?

A. It is; it may have been a little more or less.

Q. 113. Then, the total amount expended by you out of your brother's estate was $1,260 to $1,300. Is that correct?

A. I think it is somewheres near correct.

Q. 114. What did you do with the real estate of your brother after his death?

A. I do not know as I understand that question.

Q. 115. Did you rent the real estate, collect rents, pay taxes, or exercise any such control over the real estate; and, if so, to what extent?

A. I did for a year, or perhaps for a few months over a year.

Q. 116. What did you then do with the real estate?

A. I turned over the two pieces of property mortgaged 256 to Bissell to my sisters, Mary Wall and Susan Shoaff, and lived on the piece of property willed to myself and children.

Q. 117. What did you do in respect to the paper-mill property?

A. I didn't do anything; it just laid there as it was when bought from Bard.

Q. 118. Was the paper-mill business continued; and, if so, by whom?

A. It was—by Freeman & Barnett; being N. B. Freeman and A. G. Barnett.

Q. 119. Who paid the interest on the Bissell mortgage after the death of your brother?

A. Freeman & Barnett.

Q. 120. Was it paid out of the firm assets, or by you and Mr. Freeman individually?

A. I have made a mistake in my answer to question No. 119, and I wish to correct it. After my brother's death Freeman & Barnett did not pay all the interest. Myself and John E. Hill, Jr., who represented and paid for Henry J. Rudisill, paid a part of the interest. Whenever we could not get the money out of Hill, Freeman & Barnett paid it. One time, I recollect, I paid our proportion and Mr. Freeman paid for Mr. Rudisill. Sometimes it was paid out of the firm assets, and sometimes I paid the whole of it myself; how often and when I cannot now recollect, as I kept no account of it.

Q. 121. Were any of the rents of the real estate of your brother used to pay interest to Bissell?

A. No, sir.

257 Q. 122. After you turned the real estate over to your sisters did they collect the rents themselves, or did you collect for them?

A. I never had anything to do with the collecting of the rents for them.

Q. 123. State the circumstances under which you executed a satisfaction or release of the mortgage to J. H. Barnett.

A. I was asked by Mr. Rudisill to release that mortgage, and I first refused to do it, as I thought I had no power to do it under the circumstances, but was advised, I think, by Mr. Withers, that it was all right, and then I consented.

Q. 124. Did you know at the time for what purpose Mr. Rudisill desired the release executed?

A. He wanted it released to dispose of it, as he wished to go to California.

Q. 125. The object then of making the release was to enable him to sell the land; is that correct?

A. I think it was.

Q. 126. What did you receive from him, if anything, in consideration of the release?

A. I received no money but a mortgage upon some other property, including the mill itself.

Q. 127. How long was it after Mr. Rudisill first spoke to you about releasing the mortgage to J. H. Barnett that the release was executed?

A. I do not recollect.

Q. 128. Can you state about the time, or give any approximation to it?

A. I can't tell the time. I don't recollect anything about it.

Q. 129. Did Mr. Rudisill speak to you about it several times
258 before it was done?

A. He may or may not have done so; I do not recollect.

Q. 130. Did you speak with either of your sisters on the subject before you executed the release?

A. No, sir.

Q. 131. When did you first bring it to their attention afterwards?

A. I don't know as I ever brought it to their attention. We talked about it afterwards, but whether they knew about it before or not I do not know. I do not recollect how the conversation was brought about, whether they knew it from me or had learned of it from some other source.

Q. 132. How long was it after the release had been executed that it was first mentioned in conversation between you and your sisters?

A. I have no recollection of the time.

Q. 133. Do you think it was within a year or more than a year?

A. It was some time, but when I do not know.

Q. 134. Was it before or after Freeman & Barrett stopped business?

A. It was before.

Q. 135. Where did such conversation occur?

A. I do not recollect.

Q. 136. Did you have in your possession at that time the mortgage on the mill made to you by Rudisill?

A. I will not say whether it was in my house or in the recorder's office at that time.

Q. 137. Was it in one of those places?
259 A. Yes, sir.

Q. 138. Was it delivered to the recorder by you, or by your authority?

A. I do not recollect whether I took it over there. I do not know whether it was taken over there by my authority or by Mr. Withers, or who took it.

Q. 139. Did your sisters know at the time you conversed about the release of the mortgage to your brother that you had taken the new mortgage?

A. Why, I told them I had released it and taken a new mortgage on the mill.

Q. 140. What did they say to you about it?

A. I do not know as they said anything about it one way or the other. I do not at the present time recollect what the conversation was in regard to it.

Q. 141. Did they, or either of them, express any disapproval of what you had done?

A. I do not recollect the conversation we had. I only know that they knew it.

Q. 142. If they, or either of them, had expressed any dissatisfaction with what you had done would you not be likely to remember it?

A. I do not recollect of their saying one word about it, either one way or the other. I do not know as I would, either way.

Q. 143. Did they, or either of them, give you any directions as to what you should do with the new mortgage you had taken from Rudisill?

A. No, sir.

Q. 144. What did you in fact do with it?

260 A. It laid there either in the recorder's office or in my house.

Q. 145. What did you finally do with it?

A. I placed it for foreclosure.

Q. 146. Where?

A. I gave it to Mr. Coombs.

Q. 147. In all the acts done by you in settling of your brother's estate and purchasing a cemetery lot, and erecting a monument on it, and removing the remains of other members of the family to it, were you acting in good faith and in the belief that you were authorized by your brother's will to do the things you did?

A. I did.

Q. 148. Was any objection made by your sisters or children, or any one else to the exercise by you of the authority and control over your brother's estate which you assumed; if so, whom?

A. There was nothing said about it; no objections made by any person.

Q. 149. Who is the guardian of your children?

A. There has no guardian been appointed.

Q. 150. Who has in fact had custody of them and charge of their interest?

A. Their father and mother.

Q. 151. How did you come to deliver to Mr. Coombs the bond and mortgages of Rudisill for foreclosure?

A. I don't know how to answer that, except to foreclose and get the money out of it.

Q. 152. Who suggested to you to do that?

A. No one as I know of; I done it myself.

Q. 153. Was it done before or after this suit was begun?

A. About the time suit was begun.

261 Q. 154. What was the property embraced in Bissell's mortgage worth at the time the mortgage was made, and what at the time this suit was begun?

A. I think when the mortgage was given the property was worth about $13,000, and when the suit was commenced worth about $16,000 or $17,000.

Q. 155. Was any portion of the negotiations attending the making of the mortgage to Bissell conducted with Bissell or any one beside Hough?

A. No, sir; with Mr. Hough.

C. 156. Did you take Rudisill's bond and mortgages to Mr. Coombs in compliance with a request of his or upon your own volition?

A. Mr. Coombs never said anything to me about bringing them to him. I done it myself.

Q. 157. Did you have any conversation with him when you gave them to him; and, if so, what was said?

A. I do not recollect the conversation.

Q. 158. Did Mr. Coombs claim any right to the bond of Rudisill on behalf of Bissell?

A. He did.

Q. 159. When did he make that claim and *when?*

A. I took the bond and mortgage to him. When the interest was due and not paid on the Bissell mortgage Mr. D. C. Fisher told me they would foreclose the mortgage, and told me to bring in or hand to Mr. Coombs the bond and mortgage given by Rudisill, and that was the first time I had any conversation with Mr. Coombs in regard to it. What passed between us I do not recollect the conversation.

Q. 160. Did Mr. Fisher say that the property mortgaged to Bissell was insufficient to secure the debt?

262 A. I do not know as he said anything about it one way or the other, only to hand the bond and mortgage to Mr. Coombs.

Q. 161. Did Coombs say that the property embraced in the mortgage to Bissell was insufficient to secure the debt?

A. I do not think he said a single word about it.

Cross-examined by W. H. Coombs, Esq.:

Q. 162. If I understood you, you, your brother, and Henry J. Rudisill first proposed to make a joint loan of $8,000 to be secured by a mortgage on your brother's lots and Rudisill's mill property.

A. That was the understanding.

Q. 163 Did not Mr. Hough object to that arrangement and propose that you and your brother should give the bonds and mortgage and then Rudisill to execute a mortgage on the mill property to secure his part of the loan, and was it not so arranged?

(Objected to by counsel for Simons, Bass, Burgess, and the Kamms on the ground that it is leading in form, with the statement by counsel that they will object to all leading questions by the complainant or the defendants, Shoaff or Wall, without repeating this objection.)

A. When we first went to get the loan Mr. Hough did not say anything at that time—when we made the application—but afterwards when the bonds were printed and ready for execution I found

that Henry J. Rudisill's name was not in the bond; I asked
263 Hough the reason why it was not there, and he informed me
that he was afraid to send it on with his name in the application on account of his being delinquent in his own loan to Bissell; that he would get up a bond and mortgage from Rudisill to J. H. Barnett to secure the $5,000 that Rudisill was to have, and the matter was so arranged.

Q. 164. What, if anything, did Mr. Hough say at that time about the arrangement he proposed answering the same purpose as if the bond and mortgage to Bissell had been executed by Rudisill?

A. I cannot recollect the conversation, but it was so understood by all of us.

Q. 165. The complainant produces a bond of Henry J. Rudisill, which is admitted as being the original of a copy filed with the complaint as an exhibit, and asks the witness who wrote the bond and who signed it.

A. John Hough wrote the bond, and Henry J. Rudisill signed it.

Q. 166. Did you see the bond executed?

A. I did.

Q. 167. Do you recollect at what time?

A. I, on yesterday, in my testimony, got the bond mixed up with the mortgage. The bond was executed at the time we made the arrangements with Mr. Hough and we made our bonds.

Q. 168. Who had possession of the bond from the time it was executed until Rudisill executed his mortgage to your brother?

A. I now do not recollect whether Mr. Hough kept it until the mortgage was executed or whether I got it when it was first made.

264 Q. 169. What, if anything, do you know about John Hough
trying to procure a mortgage from Rudisill, and the means finally used to induce Rudisill to execute it?

A. Mr. Hough was after him a great many times, so he informed me, as he felt interested in it on account of the arrangement that had been made. Hough threatened to commence suit on Rudisill's back payments, on his own loan from Bissell, if he did not execute the mortgage.

Q. 170. Do you mean by your answer that Hough threatened to foreclose a mortgage Bissell held against him?

A. That is what I mean.

Q. 171. Did you ever take out letters, give a bond, or take an oath as executor of your brother's estate?

A. No, sir.

Q. 172. How long did you continue to receive the rent of your brother's property mortgaged to Bissell after your brother's death?

A. It was between 12 and 14 months; I cannot recollect exactly.

Q. 173. At what time did you turn over the property to your sisters?

A. I turned it over in 1873, at the time I quit receiving the rent.

Q. 174. Who paid the interest on this Bissell loan prior to your brother's death?

A. Henry J. Rudisill paid his proportion; I do not recollect how many times; then, when I could not get money from him, I paid it myself; I think that Freeman & Barnett paid it a few times.

265 Q. 175. When you or Freeman & Barnett paid interest on the loan was any part of it charged to Rudisill; and, if so, what part?

A. When Freeman & Barnett paid it I think there was five or six times that it was charged to Rudisill. At other times they paid it and it was not charged up to Rudisill. Rudisill was charged with his proportion. When I paid it myself I made no charge of it to Rudisill, as I could never get it out of him.

Q. 176. When you undertook to release a part of the property mortgaged by Rudisill to your brother what knowledge, if any, had you of a prior incumbrance by an old mortgage to Mrs. Rudisill to secure an annuity for $800.00 per year during her life?

A. I knew nothing at all about it.

Q. 177. Had you known of that mortgage at the time what influence would it have had upon you in relation to the release and taking a mortgage upon the mill?

A. I would most certainly not have taken it.

Examined by L. M. NINDE, Esq.:

Q. 178. How old are your two sons?

A. Byron Hueston is 14 years, and James William is 12 years old.

Q. 179. Is not your sister Mary without means, except her life estate in the property mortgaged to Bissell, and has she not so been since the death of your brother?

A. I think at the time of my brother's death she had about $300 or $400, which she soon spent, and from that time on she has 266 been dependent upon the rents of the Calhoun-street store, which is one of the lots mortgaged to Bissell.

Q. 180. Is not your sister Susan embarrassed and her estate encumbered, and has not that been the situation from a period before your release of the Rudisill mortgage up to the present time?

A. I think most all of her estate was encumbered at that time, and I do not know of its being released since.

Q. 181. Has she any property or means out of which she can raise sufficient money out of which to protect the mill property mortgaged to you against the annuity mortgage thereon to Mrs. Rudisill?

A. I do not think she has.

Q. 182. Have your children any estate except that held under the will of their uncle?

A. None.

Q. 183. You may state whether either your sisters or sons ever did or said anything to you authorizing you to release their said mortgage against Rudisill, or authorizing you to take said second mortgage on the mill?

A. Nothing was ever said about it on or before the release.

Q. 184. Is it not true that they never ratified said release?

A. They never consented to it and never said anything about it.

Q. 185. How long before — brother's death was it that he

267 purchased Bard's interest in the paper mill, and how long after said purchase before the mill burned down? And state what his condition of health was from the time of the purchase to the time of his death.

A. He bought that interest in September, 1870. It burned in October, 1871. He died about February 1st, 1872. At the time the purchase was made he had the consumption and had been traveling off and on to different watering places to see if he could recover his health. He had done no business; had no connection with or anything to say in regard to the mill either before or after it burned. His health continued poor to the time of his death.

Q. 186. Was he at any time after he made said purchase in a condition of health and able to do business; and, if so, how long and to what extent?

A. No, sir; he was not.

Q. 187. Did not Mr. Rudisill continue to pay his portion of the interest on said loan up to the time of your brother's death?

A. Taking what he paid himself and what was charged to him in the store as cash paid out for him by Freeman & Barnett would, I think, amount to about his proportion of the interest up to that time.

Q. 188. Were these charges by the firm on their books made by his consent, and was not said money paid on his behalf by an arrangement between the firm and him?

A. I cannot recollect in regard to all of them; but when 268 the interest would become due, about that time, I would speak to him [in] regard to it, and some of the time he would say he could not meet it, and we would have to [take] care of it for him.

Q. 189. When you had thus advanced money for him did he not promise to repay it?

A. He would sometimes say he would try and do something for us, and at other times he would speak as though he thought Mr. Freeman ought to do something.

Q. 190. Did he know these charges were made against him in the books for money advanced for him?

A. He must have known it—that the money had been paid, as Mr. Hough would give me notice, and I always went to Rudisill first. I would sometimes go three and four times. Mr. Hough would always speak to him about it, so he informed me.

Q. 191. When these applications were made to him what would he say about trying to raise the money?

A. He would almost invariably tell me he thought he would have it in a few days, and Mr. Hough would wait on the promises until the last day of the thirty days' limit. Then if he did not get it we would be compelled to pay it ourselves.

Q. 192. What arrangement, if any, did Rudisill make with your brother or with you in his behalf to pay taxes for you in consideration of interest paid by you or your brother on his behalf?

269 A. He paid the taxes one or two years for us. He was to

pay our taxes and we were to pay the interest. This arrangement was, I think, about the first payments of interest.

Q. 193. What amount of taxes altogether did he pay for you, as near as you can state, under said arrangement?

A. Our taxes, I think, were between $200 and $300 per year. He paid one year's taxes certainly, and I think two years'.

Q. 194. How much money did he pay you or your brother, before your brother's death, besides these taxes, as near as you can remember, toward the interest?

A. From $450 to $675 in money.

Q. 195. Did not your brother, as these installments of interest fell due, always, in the first instance, look to Henry Rudisill alone for five-eighths of the amount, and did he not always demand such sums from Rudisill or get you to do it for him?

A. I do not recollect that my brother ever spoke to Rudisill about the interest personally, but every time we would receive a notice from Mr. Hough he would enquire whether Rudisill was keeping up his part of the interest, and would urge me to commence early in the month to get it from him. I always demanded the same from Rudisill.

Q. 196. After you turned over the property to your sisters in 1873, as you have stated, have you ever done any act or thing as executor of your brother other than the attempted release of the 270 Rudisill mortgage; and, if so, what?

A. I have done nothing at all.

By W. H. Coombs, Esq.:

Q. 197. At your first interview with me in reference to this matter, as you have stated, did you give me any other paper than the Rudisill bond and the mortgage to your brother?

A. No, sir; not as I recollect of.

Q. 198. At that interview did I not say to you that Bissell had such an interest in the Rudisill bond and mortgage that it could be foreclosed in the same suit with the mortgage he held against your brother's property, and that the proceeds of such foreclosure would apply as payments on your bonds to Bissell and release your brother's property to that extent?

A. I think that was about the substance of the conversation.

Q. 199. At that interview did you inform me of the release of the Rudisill mortgage, or that a mortgage had been executed on the mill property?

A. I don't think I did.

Q. 200. Did I not some time after the commencement of this suit call on you and say that I was informed that a mortgage upon the mill had been executed to you, and did you not then say you had entirely forgotten that transaction?

A. Yes, sir.

Q. 201. Did you not afterwards find the mortgage on the mill in the recorder's office?

A. Yes, sir.

Q. 292. Have you any personal interest in the subject-matters of this suit?

271 A. I have not myself.

Q. 203. Have you not been through the bankrupt court and procured your discharge; and, if so, about what time?

A. I have been; I think I got my discharge in 1878.

The further taking of these depositions is now adjourned to June 4, 1880.

June 3, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 4th day of June, 1880, the taking of these depositions is proceeded with as follows:

Re-examination by Hon. R. S. TAYLOR:

Q. 204. Do you wish to be understood as saying that H. J. Rudisill paid to Hough personally any installments of interest on the Bissell loan to you and your brother?

A. No, sir; I do not recollect [that] he ever did. He always handed it to me or done it through me.

Witness at this point, upon his own motion, makes the following correction of his former testimony:

At my first interview with Mr. Coombs, when I gave him the first bond and mortgage of Rudisill, I said nothing about any second mortgage. A few days after that interview Mr. Coombs wished me to take him over to see the property that was mortgaged by Rudisill to J. H. Barnett. We then went over and examined it. We supposed that the Bloomingdale road ran south of the mill, and after examining it, Mr. Coombs made the remark that I had released most all the security there was. Some days after that my 272 attention was called to the second mortgage, which I had forgotten, and I went to the recorder's office and got it and handed it to Mr. Coombs; therefore the conversation I had with my sisters in regard to the mortgage must have been after the time I got the second mortgage from the recorder's office.

Q. 205. Who called your attention to the second mortgage at the time you speak of?

A. I do not know, but think it was John E. Hill, Jr.

Q. 206. Was it not your sisters, or one of them?

A. No, sir.

Q. 207. Why do you say "therefore it must have been after you got the mortgage from the recorder's office that you talked with your sisters about it?"

A. Because I had forgotten all about it.

Q. 208. Do you now remember talking with your sisters about it since you took the mortgage from the recorder's office; and, if so, when and where did the conversation occur?

A. I can't tell the dates; I think the conversation was in my sister Susan's house, and I think I told them that even the second mortgage was ample, as I knew nothing about the mortgage to Mrs. Rudisill.

Q. 209. Was Mrs. Wall present at that conversation?

A. I think that Mary Wall, Susan Shoaff, and John A. Shoaff were present.

Q. 210. You have no reason to say now that you did not have conversations with your sisters about the second mortgage at the time you mentioned, except as an inference from the fact that you had
273 forgotten it when you talked with Mr. Coombs, have you?

A. I want it understood that of course I could not have spoken to them about it before, as I had forgotten all about it when I first spoke to Mr. Coombs.

Q. 211. Have you had some conversation on this subject with any one since last night?

A. Nothing only I told Mr. Coombs I was mistaken, and I would have made some correction yesterday had Judge Taylor commenced his re-examination.

Q. 212. Did he agree with you on that point?

A. All he said was: I knew you were mistaken, and passed on.

Q. 213. What was the original understanding between you and your brother and N. B. Freeman as to the purpose for which the money was to be used; was it not for the use and benefit of Mr. Freeman?

A. We had no understanding and no agreement with Mr. Freeman in regard to the money. This arrangement was between Rudisill, my brother, and myself, and Rudisill was to furnish the money for Freeman.

Q. 214. Five thousand dollars of the money was borrowed for the exclusive use of Freeman, was it not?

A. That was what Rudisill said he was going to use it for.

Q. 215. Did you have no conversation with Mr. Freeman about it—about making the loan?

A. Only that he ought to have some more money in [the]
274 concern, and Mr. Rudisill knew that fact and was anxious to get the money with us through Mr. Hough.

Q. 216. Did Mr. Freeman say that he would get Rudisill to help him raise the money?

A. I think he never said anything to Mr. Rudisill about how the money should be raised. It was Mr. Rudisill's voluntary act to raise the money for him.

Q. 217. The money did not go into the hands of Rudisill at all, did it?

A. I now do not know whether it went into the hands of Mr. Rudisill or went right into the hands of Mr. Freeman.

Q. 218. You say that the original understanding between you and your brother and Rudisill was that Rudisill should unite in the loan from Bissell as a borrower and mortgage his mill to secure his part of it; is that correct?

A. Yes, sir.

Q. 219. When and how was any change made in that arrangement?

A. I have stated that before. We went to Mr. Hough to make the loan and he was afraid he could not get the loan with Rudisill's name in the bonds, and he fixed it up in the way it was done by Rudisill giving a bond and mortgage to my brother for the amount.

Q. 220. Did you and your brother and Rudisill agree to that change in the arrangement; and, if so, what agreement did you make with him?

A. It was agreed to get the money. The arrangement was accepted as Mr. Hough had made. I do not think any one objected to it, as we had implicit confidence in Mr. Hough—whatever he 275 would do he would do for the best for all parties.

Q. 221. The agreement upon which you finally signed the bonds was that you and your brother should make the loan from Bissell, and then that Rudisill should make his bond and mortgage the mill to your brother to secure him against $5,000 of the money; is that correct?

A. That is not exactly as we understood it. It was not the mill, but the mill property. It was to be as though he had got the money from Bissell direct. This bond and mortgage from Rudisill was to have been the same as though he had joined in the Bissell loan and he had got the money direct from Bissell, and to cover the same property that was orginally intended to be put into the Bissell mortgage.

Q. 222. What is the age of Elizabeth Rudisill, if you know?

A. I do not know.

Q. 223. What did you do, if anything, to induce Rudisill to execute the mortgage?

A. I went after him many times to get him to execute it.

Q. 224. On question No. 169 being propounded to you you wanted to know whether you should only say what Hough did. You may now state fully all that you or any one else did or said to procure the execution by Rudisill of a mortgage to your brother, John H. Barnett.

A. I went very frequently—I do not know how many times—to Mr. Rudisill to get him to execute the mortgage; my brother also went to see him; I brought him over in the buggy one time 276 when he was sick to see Rudisill; Rudisill would often promise to execute the mortgage, and then go out and leave my brother sitting in his office.

Q 225. You refer, I suppose, to the security which you say Rudisill was to give at the time of your application to Bissell?

A. Yes, sir.

Recross-examination by W. H. COOMBS, Esq.:

Q. 226. If $5,000 of the money loaned from Bissell, or any part of it, was handed over by you to Freeman, by whose direction was it done?

A. It was understood between Mr. Rudisill, myself, and my brother that the $5,000, less the commissions paid Hough, was for the benefit of Mr. Freeman's interest in the paper mill.

By L. M. Ninde, Esq.:

Q. 227. You may state—was not the first arrangement when you, your brother, and Rudisill went to Mr. Hough that he should make an application to Bissell for an $8,000 loan, to be secured by a joint mortgage to be executed by your brother and Rudisill, and that Rudisill should put in the said thirteen acres of ground and your brother his two lots, and that Rudisill should execute the bonds jointly with you and your brother?

A. The arrangement was between Rudisill, my brother, and myself; that my brother was to mortgage his two lots, and Rudisill was to mortgage his mill property and to sign the bonds jointly with us.

277 Q. 228. What property was agreed upon at that time that you designate as the "mill property?" How much land was he by the agreement to include in the mortgage?

Objected to by counsel for Simons, Bass, Burgess, and the Kamms on the ground that it calls for a statement of conclusions and not facts.

A. It was all that land included and described by metes and bounds in the mortgage Rudisill gave to J. H. Barnett, and was supposed by — to include the mill.

Redirect examination by R. S. Taylor:

Q. 229. What were the words used by Rudisill in his agreement with you and your brother in relation to the mortgage to be made by him? Did he describe the property by metes and bounds or as the "mill property?"

A. He called it the mill property, to the best of my recollection.

By L. M Ninde:

Counsel for Simons, Bass, Burgess, and the Kamms object to further examination of this witness by counsel for opposing parties.

Q. 230. Why do you say that the mill property spoken of by Rudisill was understood to be the land he did actually mortgage and the mill?

Objected to by counsel for Simons, Bass, Burgess, and the Kamms.

A. Because it was always spoken of and called as that, the same as the place where the old lady lives is called the homestead.

A. G. BARNETT.

And the said Oscar A. Simons, being duly sworn to testify the truth, the whole truth, and nothing [but the truth] relating to said cause, deposes as follows:

278 Examined by R. S. Taylor:

Q. 231. State your name, age, and residence and whither you are one of the defendants in this cause.

A. My name is Oscar A. Simons; age, 46 years; residence, Fort Wayne, Indiana, and I am one of the defendants.

Q. 232. State whether or not you and John H. Bass purchased from Charles A. Zollinger the tract of land described in your answer in this cause; and, if so, state the consideration paid by you for said land.

A. We purchased the interest of Charles A. Zollinger in the Burgess, Kamm, & Zollinger property, being the same as described in our answer, and paid him $1,500.00.

Q. 233. State what the fact is as to whether or not you had at the time of such purchase any knowledge of the existence of any mortgage lien on said lands in favor of George P. Bissell or J. H. Barnett or any one else.

A. I had no knowledge of any mortgage lien.

Q. 234. What steps, if any, did you take to ascertain whether or not the title to said lands was clear of incumbrances?

A. Zollinger furnished us an abstract of the title to the property, and we went to the recorder's office and the office of the clerk of the court to verrify it.

Q. 235. State what, in your judgment, the land purchased by you from Zollinger was worth at the time of your purchase?

279 A. I considered it a good bargain at the time of our purchase. My judgment now is that it was not worth at that time more than $1,600 or $1,800.

OSCAR A. SIMONS.

And now the further taking of these depositions is adjourned to June 8th, 1880.

June 4, 1880. GEO. D. CRAM, *Notary*.

And now, on this 8th day of June, 1880, the further taking of these depositions is proceeded with as follows:

The said WARREN H. WITHERS, being recalled, deposes as follows:

Examined by R. S. TAYLOR:

Q. 236. State how long and intimately you have been acquainted with the property constituting the St. Joe mills and the Rusidill homestead, and state what constituted the homestead and what the "mill property."

A. I have been acquainted with the property enquired about for over thirty years, intimately. The mill property consisted of that portion of the homestead lying east of the St. Joe road and embraced the land on both sides of the river, the dam, mill, and head and tail races, comprising in all about 14 or 15 acres, including the river. The "homestead" embraced all the land owned by Mrs. Elizabeth Rudisill on the west side of St. Joe road.

Q. 237. State what is the fact as to whether or not any of the land west of the St. Joe road was ever used in the operation of the mill or spoken of or designated as part of the "mill property."

A. I do not think it was.

Q. 238. State how long the St. Joe road has been located as it is now travelled.

280 A. From the mill north it has not been changed for the last thirty years.

Q. 239. Do you know the location of the tract of land conveyed by Henry J. Rudisill and wife to Burgess, Zollinger & Kamm? And, if so, state on which side of the St. Joe road it lies and what is the fact *is* to whether or not it embraced any portion of the property known and used as the "mill property."

A. I do know the property inquired about; it lies west of the St. Joe road; was never known or regarded as a part of the mill property; until about the time of said sale it was used as a farm.

Cross-examined by W. H. COOMBS:

Q. 240. Does the boundaries given in the mortgage from Rudisill to J. H. Barnett include any part of the mill property, and does it not include the greater part of the mill-race between the mill and the dam?

A. I do not know what property the original mortgage to Barnett did cover. I never understood, however, that it covered any portion of the mill property, but that the mortgage to A. G. Barnett does.

Q. 240. Does not the boundaries given in that mortgage that is bounded on the east by the St. Joe river, on the south by the Bloomingdale road, west by the feeder to the Wabash & Erie canal, and north by the lands of Julia A. Freeman include the greater portion of the head race to the mill between the mill and dam?

281 A. I think the description given in the interrogatory does cover nearly, if not the entire, head race to the mill.

W. H. WITHERS.

And now the further taking of these depositions is adjourned to June 15th, 1880.

June 8, 1880. GEO. D. CRANE, *Notary*.

And now, on this 15th day of June, 1880, the further taking of these depositions is proceeded with as follows:

The said CHARLES A. ZOLLINGER, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Q. 241. State your name, residence, occupation, and whether or not you are the same person who, with Henry Burgess and Jacob J. Kamm, purchased from Henry J. Rudisill a tract of land containing about thirteen acres on the 23d day of January, 1875.

A. My name is Charles A. Zollinger; I reside in Fort Wayne; am mayor of the city, and am the same person who made the purchase specified.

Q. 242. State how much was paid for that land by you and said Burgess and Kamm, and how it was paid.

A. Ten thousand dollars in cash.

Q. 243. State what information, if any, you had before said purchase of the existance of a mortgage on the land purchased in favor of J. H. Barnett, and of the release of said mortgage.

282 A. We knew that there was such a mortgage, and also that it was released by A. G. Barnett, who was, as we understood, his executor. Supposing that release to be legal and valid, we bought the land and paid the money. I did not know that A. G. Barnett had failed to file a bond or take out letters, or that there was any want of regularity in his proceedings. We supposed it was all right or we would not have paid the money.

Q. 244. What did you know, if anything, as to the payment of said mortgage?

A. My understanding was that the mortgage had been paid before, but that the executor had neglected to satisfy it.

Q. 245. What was done with the property by you and your associates?

A. We laid out the greater portion of it immediately into town lots, as an addition to Fort Wayne.

Q. 246. What did you do toward making public the platting of the property into lots?

A. We had a map of the addition and its surroundings made and printed and extensively circulated, advertized the addition in the papers, and used all the means we could to find purchasers for the lots.

Q. 247. Did you sell any lots; and, if so, how many?

A. I remember of four that were sold. There may have been some others sold by Kamm or Burgess that I do not know of.

Q. 248. State whether or not such sales were for full value, and whether or not the purchasers paid for the lots purchased.

283 A. Mr. McCurdy paid $600 for one lot and Hattersley paid $1,000 for two. Hoffmeister purchased for $650 and paid $50 only of the amount. These prices were the full value of the lots at the time, and more than they are worth now.

Q. 249. State whether or not you have sold your interest in said property; and, if so, to whom and for what.

A. I sold my interest to Oscar A. Simons and John H. Bass for $1,500, which they paid me in cash.

Q. 250. Did you at the time of said sale know that there was any incumbrance on said property, or that the release of the mortgage to J. H. Barnett was in any way invalid?

A. No, sir; on the other hand, I supposed Barnett had full authority to release the mortgage, and that was no longer any incumbrance on the land.

Cross-examined by W. H. Coombs:

Q. 251. Did you examine the records of the will of J. H. Barnett, or take any measures to ascertain whether he was or was not authorized to make that release?

A. I did not personally, but Mr. Kamm had some one employed to do it. I don't know who it was. I did not personally make any examination of the records or title.

C. A. ZOLLINGER.

And the said WARREN H. WITHERS, being recalled, deposes as follows:

Q. 252. State whether or not you witnessed the execution
284 of this mortgage; and, if so, by whom it was executed.

The witness is here handed mortgage referred to in the cross-bill of Oscar A. Simons and John H. Bass, and is marked by the notary with his name and the letter "A" for identification.

A. I drew up and witnessed the execution of this mortgage. It was executed by Henry J. Rudisill and Elizabeth E. Rudisill, his wife.

Q. 253. Did you witness the execution of this paper; and, if so, by whom was it executed?

Here the witness is handed paper marked "B" by the notary for identification.

A. I did; it was executed by Elizabeth Rudisill.

W. H. WITHERS.

The further taking of these depositions is now adjourned to June 16, 1880.

June 15, 1880.

GEO. D. CRANE, *Notary*.

And now, on this 16th day of June, 1880, the taking of these depositions is proceeded with as follows:

The said JOHN E. HILL, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 254. State your name, age, residence, occupation, and the relation you bear to this suit.

A. My name is John E. Hill; age, 40 years; reside in Allen county, Indiana; am engaged in farming, and am one of the defendants.

Q. 255. Are you the defendant, John E. Hill, who purchased of Henry J. Rudisill the undivided one-half of his interest in the St. Joe mill property in this county and State?

285 A. Yes, sir.

Q. 256. When did you purchase it, and what was the purchase-price?

A. I purchased it, I think, in November, 1875; the price was $2,500.00.

Q. 257. Do you know the defendant, Mrs. Elizabeth Rudisill, who at the commencement of this suit held a mortgage on the mill property to secure to her an annuity of $800.00?

A. I do.

Q. 258. State whether or not she has received anything thereon from you; and, if she has, what amount.

A. She received from me four hundred and fifty-odd dollars; whether it was thereon or not I don't know. It was a book account.

Q. 259. When did you pay this sum?

A. From 1875 to 1880. I think it commenced some time in 1876.

Q. 260. State whether or not you paid this amount knowing the annuity to be in arrears.

A. No, sir; I did not know there was any annuity.

Q. 261. You may state what, if anything, Henry J. Rudisill ever said to you about this payment.

A. He wrote me a letter, stating I should let his mother have a little money from time to time, and flour and feed out of the mill. He did not state whether it should be charged to him or her, and I charged it to her.

Q. 262. You may state whether or not she has ever paid you; and, if not, why.

A. She never paid me.

Q. 263. What is the value of the St. Joe mill property, if you know?

286 A. Twenty-five thousand dollars.

Cross-examined by W. H. Coombs, Esq.:

Q. 264. When you purchased an interest in that mill property did you know that it was encumbered by a mortgage to Mrs. Rudisill to secure an annuity of $800.00?

A. No, sir.

Q. 265. What did Henry J. Rudisill say to you at the time of the purchase about encumbrances upon the property?

A. He said there was a $5,000 mortgage upon the property, and gave me the impression that that was all.

J. E. HILL.

And the said Henry Burgess, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. Alden, Esq.:

Q. 266. State your name, age, residence, and relation to this suit.

A. My name is Henry Burgess; age, 69 years; reside in New Haven, Allen county, Indiana, and am one of the defendants in this suit.

Q. 267. The original deed from Henry J. Rudisill and wife to Charles A. Zollinger, Henry Burgess, and Jacob J. Kamm, marked "C" and signed by the notary for identification, is shown the witness, and he is asked: Did you witness the execution by Henry J. Rudisill and Elizabeth E. Rudisill of this deed?

A. I saw them execute it.

287 Q. 268. After this deed had been executed and acknowledged, to whom, if any one, was it delivered?

A. It was delivered to us—Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm.

Q. 269. State whether or not the property conveyed by this deed was surveyed and the boundaries determined at that time.

A. It was surveyed about that time.

Q. 270. State whether according to said survey the boundaries of said property are correctly stated in the description of the same contained in your answer.

A. I think they are.

Q. 271. The plat filed with defendant's answer as "Exhibit B" is shown witness and is marked "D," and signed by the notary for identification. You may state whether or not this is a correct plat of Burgess, Zollinger, & Kamm's addition to the city of Fort Wayne, and also of the entire premises purchased by yourself, Charles A. Zollinger, and J. J. Kamm of Henry J. Rudisill, and whether the location of the boundary line between Wells' pre-emption and the fractional southeast quarter of section 35, township 31 north, of range 12 east, in Allen county, Indiana, is correctly shown on said plat.

A. It is to the best of my knowledge. I saw this compared with the plat in the auditor's office of Allen county, and believe it to be correct.

Q. 272. What, if any, statements to you, or either of you, as to there being any liens or encumbrances on said property, did Henry J. Rudisill make at the time of said purchase?

288 A. He said it was free and clear of everything; there had been a sheriff's sale to Henry Monning of part of this property and some taxes were due, and I think the bank had a judgment which were paid off and released at the time the purchase was consummated; Mr. Rudisill received only about $200 of the entire $10,000 after paying off liens. I knew personally that the Monning sheriff's sale of about $3,300 and another incumbrance of about $400 to 500 was paid, and to whom; and I knew that the remainder of the $10,000, except about $200, was employed in paying off encumbrances on the property, but cannot now say to whom.

Q. 273. You may state what, if anything, you know about the release of a portion of a mortgage executed by Henry J. Rudisill and wife to John H. Barnett on a portion of the premises so purchased.

A. I did not know personally of the release, but was told it was released, and I do not know whether it was paid with this money or not.

Q. 274. What is the fact as to whether or not you understood said mortgage had been paid and properly satisfied?

A. I understood that it was properly satisfied and paid; our abstract of title to the property represented it so.

Q. 275. Had you any knowledge or suspicion that the entry of release made by A. G. Barnett on the margin of the record of said mortgage from said Rudisill and wife to J. H. Barnett was informal, invalid, or anything other than a valid and proper release of 289 such portion, if any, of the premises you purchased as the mortgage covered?

A. I supposed it was wholly released, and that there was no doubt about it.

Q. 276. What, if anything, did you know at that time as to A. G. Barnett's having or not having been granted letters testamentary by the probate court of Allen county as executor of his deceased brother, John H. Barnett?

A. I knew nothing about it.

Q. 277. If you caused an abstract of the title or said property purchased to be made at that time, state what the same showed as to the title being clear and unencumbered, or otherwise.

A. The abstract showed it all clear and free of incumbrance.

Q. 278. State the facts as to whether or not you caused a search to be made by an attorney of the records of Allen county to determine whether the title to said property was good and all incumbrances thereon properly released at the time of such purchase; and, if so, what report such attorney made.

A. We did, and he reported it all clear.

Cross-examined by W. H. Coombs, Esq.:

Q. 279. Did the attorney you employed give his opinion in writing?

A. I do not know how that was.

Q. 280. Was the abstract you obtained in writing?

A. I suppose it was.

Q. 281. Did you see the abstract yourself before you made the purchase?

A. I cannot positively say whether I did or not. I think I did, although I will not be positive.

290 Q. 282. Did you examine the record of John H. Barnett's will to ascertain whether it gave A. G. Barnett authority to make the release you speak of?

A. I did not. I knew nothing about that except through our attorney.

Q. 283. Did you examine the records of the court, or take any measures to ascertain whether A. G. Barnett had qualified as executor of John H. Barnett, deceased?

A. I did not, no further than our attorney reported it was all correct and no claims.

Q. 284. Did your attorney report that A. G. Barnett had qualified as executor of John H. Barnett, deceased?

A. There was nothing said respecting that, as I recollect.

Redirect examination by S. R. Alden, Esq.:

Q. 285. Is the description in your answer of the portion of said Burgess, Zollinger & Kamm purchase, which you now own, correct?

A. I think it is.

HENRY BURGESS.

And now the further taking of these depositions is adjourned to July 9th, 1880.

June 16, 1880.

GEO. D. CRANE, *Notary.*

And now, on this 9th day of July, 1880, the taking of these depositions is proceeded with as follows:

The said WARREN H. WITHERS, being recalled, deposes as follows:

Examined by S. R. ALDEN, Esq.:

291 Q. 286. The original mortgage from Henry J. Rudisill and Elizabeth E. Rudisill, his wife, to Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased, dated January 23rd, 1875, marked E and signed by the notary for identification, is shown the witness, and he is asked: State, if you know, who wrote this mortgage.

A. I drew it myself.

Q. 287. You may state whether or not, to your knowledge, it was executed by Henry J. Rudisill and wife and delivered to Abraham G. Barnett?

A. It was executed by Henry J. Rudisill and Elizabeth E., his wife, and delivered to Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased, in my presence.

Q. 288. State, if you know, for what purpose this mortgage was executed and delivered as aforesaid.

A. It was made in substitution or lieu of a mortgage for a similar amount executed by Rudisill and his wife to John H. Barnett, which was, after his death, satisfied by Abraham G. Barnett, as his executor, at the request of Rudisill.

Q. 289. The witness is shown a certified copy of the record of a mortgage from Henry J. Rudisill and Elizabeth E., his wife, dated December 13th, 1871, which record is found on page 276, volume 21, of the mortgage records of Allen county, Indiana, and also a
292 certified copy of an entry of release and satisfaction of a part of said mortgage found on the margin of said record of said mortgage on said page 276 of said mortgage record, which certified copies is marked F and signed by the notary for identification. The witness is asked: Examine this certified copy of mortgage and marginal release, and state whether or not you are familiar with the original record and have examined the same, and whether this certified copy of mortgage record and marginal entry of release and satisfaction are true and complete copies of the same, in form as well as in substance?

A. I have examined the original record and marginal release. I believe this is a true copy of said mortgage and marginal release, in form and substance.

Q. 290. State, if you know, who executed the marginal entry of release and satisfaction of which this is a copy.

A. It was executed by Abraham G. Barnett.

W. H. WITHERS.

STATE OF INDIANA, } ss:
Allen County, }

I, George D. Crane, a notary public within and for said county and State, hereby certify that the above-named Newton B. Freeman, Warren H. Withers, Abraham G. Barnett, Oscar A. Simons, Charles

A. Zollinger, John E. Hill, and Henry Burgess were by me duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by me and by R. S. Taylor 293 under my directions; that the said complainant and the defendants Shoaff attended, by their respective counsel, and said depositions were taken at the office of Taylor & Morris, in the city of Fort Wayne, county of Allen, State of Indiana, on the 1st day of June, 1880, and subsequent days, as shown by the adjournment orders therein, between the hours of 8 a. m. and 6 p. m. of said days.

I further certify that these depositions were taken by agreement of counsel, and by further agreement all objections are to be made to the court.

In testimony whereof I have hereunto set my hand and notarial seal this 9th day of July, A. D. 1880.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

Depositions of John A. Shoaff, Susan R. Shoaff, and William H. Goshorn, witnesses produced and sworn before me, a notary public, at Fort Wayne, in Allen county, State of Indiana, on the 14th day of June, 1880, pursuant to agreement of counsel.

These depositions were taken on the part of the defendants, John A. Shoaff and Susan R. Shoaff, in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is complainant, and Abraham G. Barnett *et al.* are defendants.

294 The said JOHN A. SHOAFF, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by L. M. NINDE, Esq.:

Q. 1. State your name, age, residence, and relationship to Susan R. Shoaff, one of the defendants in this action.

A. My name is John A. Shoaff; age, 42 years; reside in Fort Wayne, Indiana, and am the husband of Susan R. Shoaff.

Q. 2. What knowledge, if any, have you of the mortgage described in the bill of complaint in this cause as executed by Henry J. Rudisill and Elizabeth Rudisill, his wife, to John H. Barnett as security for the sum of $5,000, or thereabouts, as described in a certain bond in said mortgage specified? You may also state what you know, if anything, of a satisfaction entered upon the margin of the record of said mortgage and a discharge of a portion of said mortgage-premises therefrom, and when you first learned of such discharge being executed, and under what circumstances.

A. I have heard there was such a mortgage. I have seen the bond. Shortly after the commencement of this suit Mr. A. G. Barnett, at that time, told me that some time before Mr. Rudisill came to him and asked him to release thirteen acres of the property, exclusive of the mill, and that he had done so, but that it would not be good, as he was not empowered to do so, not having taken out certain papers. That was the first I knew upon what property the mortgage was aside from the mill.

295 Q. 3. If you ever knew anything about said A. G. Barnett releasing any part of said mortgage prior to the commencement of this suit, say so; and if you did not, say so.

A. I did not.

Cross-examination by R. S. TAYLOR, Esq.:

Q. 4. When and where did you see the bond of Rudisill, and who was present at the time you looked at it?

A. Mr. Barnett gave it to me to look at. I do not think any other person was present. This was probably two or three years ago.

Q. 5. Did you call on him for it?

A. No, sir.

Q. 6. How did he happen to show it to you?

A. I had a bond given by my brother to guarantee part of a loan, drawn up by Mr. Hough—who also drew up the bond between Rudisill and Barnett—who left out a proviso if the interest was not paid when due the bond would become due and payable, thus giving me a great deal of trouble to collect the same. I told Mr. Barnett of that circumstance. He said he wanted me to look at this Rudisill & Barnett bond to see if it was made in the same way.

Q. 7. Did you know before that time of the existance of Rudisill's bond; and, if so, of whom did you get your information?

A. I knew of a mortgage given by Henry Rudisill to J. H. Barnett. To the best of my recollection any knowledge I had of it came through Mr. Barnett. Whether the mortgage was the

296 bond or the bond the mortgage I did not know. I knew there was some instrument.

Q. 8. At the time you looked at the bond was there any conversation between you and Mr. Barnett about the security which had been given by Rudisill; if so, what was it?

A. I can't remember anything about that, one way or the other.

Q. 9. You say you understood the security given to be a mortgage on the mill, and no more; from what source did you get that understanding?

A. At some time when I was informed there was a mortgage it was spoken to me as a mortgage upon the mill. I cannot say from whom that came, but presume from Mr. Barnett.

Q. 10. Was all the business of J. H. Barnett settled by A. G. Barnett; and, if so, was that done by the consent of your wife and all the heirs?

A. What business does that al-ude to?

Q. 11. To all the business embraced in the settlement of the estate of J. H. Barnett.

A. To the best of my knowledge, I suppose it was. As far as I know he never made any regular report to them—done as he pleased—and they supposed he would do right.

Re-examination by L. M. Ninde, Esq.:

Q. 12. Is it not true that what Mr. Barnett did he did on his own motion, without asking any consent from either Mrs. Shoaff or Mrs. Wall, so far as you know?

A. It is.

J. A. SHOAFF.

297 And the said Susan R. Shoaff, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

The further taking of these depositions is now adjourned to June 15, 1880.

June 14, 1880.

GEO. D CRANE, *Notary*.

And now, on this 15th day of June, 1880, the taking of these depositions is resumed as follows:

Examined by L. M. Ninde, Esq.:

Q. 13. State your name, age, residence, and whether you are the Susan Shoaff who is defendant to this suit.

A. My name is Susan R. Shoaff; my age, 38 years; my residence is Fort Wayne, Indiana. I am the Susan Shoaff who is defendant to this suit. I have always signed my name Susan R. Shoaff.

Q. 14. State when you first became acquainted with the fact that the defendant hereto, A. G. Barnett, had executed a release upon the margin of the record of a mortgage executed by Henry J. Rudisill and wife to John H. Barnett to secure a bond conditioned for the payment by said Rudisill of a part of the indebtedness sued on in this case. State not only when you learned of such release, but how and from whom you learned of such release.

A. I heard it last year; some time the latter part of the summer, I think, but am not certain. That was the first time that I heard of it. I heard it from my husband.

Cross-examined by R. S. Taylor, Esq.:

Q. 15. When and from whom did you first hear of the bond, if at all?

298 A. I heard it from my husband, but I cannot tell when.

Q. 16. Did you ever have any conversation with A. G. Barnett on the subject of Rudisill's bond or mortgage, or hear him make any statements about it?

A. I don't ever remember of having any conversation with him or *having* him say anything about it. All my information has been received from my husband.

Q. 17. After the death of your brother, J. H. Barnett, who took charge of his property and settled his estate?

A. My brother, Abraham Barnett.

Q. 18. Did you have any conversation with him about the business while it was in his hands?

7

A. None whatever.

Q. 19. Was any objection made by you or any of the heirs or devisees of your brother, J. H. Barnett, to the authority of your brother to manage and control the estate as he did?

A. No; it was so stated in the will that he should do so.

Q. 20. Did you and all the other heirs and devisees concur in your consent that A. G. Barnett should go on and manage the estate as directed by the will?

A. We never gave any consent; there never was anything said about it.

Q. 21. Did you or any of the others make any objections?

A. No; I think none whatever, so far as I know.

Q. 22. What did you understand had been mortgaged by Mr. Rudisill?

299 A. I understood the mill. I did not know of anything else. I don't think I knew of the thirteen acres until I learned of the release.

Q. 23. You knew, did you not, that A. G. Barnett was managing the estate and exercising full control over it?

A. Yes; until we received our property.

Q. 24. What property did you receive?

A. The fruit-house, or the lot it is on, for my lifetime, and the five acres on Spy Run avenue, also for life; remainder to my children.

Q. 25. After you and your sister received the property devised to you, did not the remainder of the estate remain in the hands of A. G. Barnett and under his control as before?

A. There was no remainder of the estate but what was to go to his own children, except an interest in the paper-mill, which was to go to my sister's boy. That remained in his control.

Q. 26. Did not the bond of Rudisill also remain in his control?,

A. Yes; so far as I know; I don't know anything about it?

Q. 27. Did you ever pay any interest to Bissell on the loan from him?

A. I never did.

Q. 28. Did not A. G. Barnett, down to the time of the commencement of this suit, continue to exercise the same entire control over all matters pertaining to your brother's estate, except as to the real estate devised to you and your sister?

A. He did.

300 Q. 29. Did not you and your sister acquiesce in all his acts without objection on your part, or on hers, so far as you know?

A. We never made any objections.

Re-examined by L. M. Ninde, Esq.:

Q. 30. Did you ever say anything to your brother Abraham on the subject of the management of your brother's, J. H. Barnett, estate, or his authority to take charge of it?

A. No; I never did.

Q. 31. Did you not acquiesce in what he done because you supposed he had the authority to do so only?

A. That was the only reason. It was so stated in the will.

Q. 32. Has your brother Abraham ever done anything, with your knowledge or by your concurrence, since you got possession of your portion of the property?

A. He has never had anything to do with — since I came into possession.

Q. 33. How soon after your brother's death did you get possession of your portion of the property?

A. I can't remember exactly; but think it was a little more than a year.

Q. 34. Did you ever give your brother Abraham any authority whatever to interfere with or release the mortgage from Rudisill to your brother, John H., or the bond secured by it?

A. None whatever; it was never mentioned to me.

SUSAN R. SHOAFF.

The taking of these depositions is now adjourned to June 29th, 1880.

GEO. D. CRANE, *Notary*.

301 And now, on this 29th day of June, 1880, the taking of these depositions is proceeded with as follows:

The said WILLIAM H. GOSHORN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by L. M. NINDE, Esq.:

Q. 35. State your name, age, residence, and occupation.

A. My name is William H. Goshorn; age, 44 years; residence, Fort Wayne, Indiana, and am county surveyor of Allen county, Indiana.

Q. 36. State what you know, if anything, about a survey and plat attached to the cross-complaint of Mary Wall, Watson Wall, Susan R. Shoaff, John A. Shoaff, Byron Huston Barnett, and James William Barnett, by their guardian *ad litem* and next friend, L. M. Ninde, which cross-complaint and the plat thereto attached are now placed in your hands, which plat is marked Exhibit A and signed by the officer taking this deposition, and which you will also countersign for the purpose of identity. You may state who made the survey exhibited in said plat. In your answer you may identify and particularly describe by courses and distances the land included in said survey.

A. I now have said plat in my hand; it is marked Exhibit A and signed by the officer, and also signed by me. I surveyed the land included within the red lines on said plat. A description of that was furnished me by Mr. Coombs from a mortgage. I took the description from the mortgage myself, 302 which is the same as this on the plat, in the following words: "All that portion of the southeast quarter of section thirty-five, township thirty-one, range twelve east, bounded on the east side by the St. Joseph river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman." As this description did not describe any lands except what was in the southeast quarter of section 35, town. and range aforesaid, I commenced at the intersection of the east line of the Wabash and Erie canal feeder with the south line of section 35, thence north 86° east, along the south line of said section 35, nine (9) chains to the intersection of the centre line of the old Bloomingdale road; thence north 60½° east, along the center line of said Bloomingdale road, thirteen chains and fifty links (13 50) to the St. Joseph river; thence north 23° west, along said river, three chains and six links; thence south 86° west, along the south line of Julia A. Freeman's land, fifteen chains and thirty links to the Wabash & Erie canal feeder; thence southwesterly along said canal feeder to the place of beginning, containing fourteen (14) acres, more or less.

Q. 37. You may state whether the courses and distances given in your answer is an ac-urate description and survey of the land
303 generally described in said mortgage in the terms set forth in your above answer.

A. Yes, sir; I regard the cources as perfectly correct. The width of the right of way on the canal feeder not being given, I do not know how near I have a right to go to it, and the same on the St. Joseph river. On the St. Joseph river I went half way between the high and low water, as near as I could ascertain; on the feeder I went to the toe of the bank.

Cross-examined by S. R. ALDEN, Esq.:

Q. 38. Is the so-called Bloomingdale road, of which you speak, a public highway?

A. Not at present.

Q. 39. Was it ever laid out as a public highway?

A. I do not know.

Q. 40. Is it still in existance; and, if not, when was it last used as a road?

A. That part of it through lots 25, 26, 27, 21, & 22 has been traveled for probably a year after the part east of that had been closed; it has not been used as a public highway since the purchase of Burgess, Zollinger, & Kamm from Henry J. Rudisill.

Q. 41. What was the width of said old Bloomingdale road?

A. Twenty-five feet.

Q. 42. Do the three parallel dotted lines on the plat, concerning which you have testified, show the former direction and boundary lines of said road?

A. Yes, sir: with the exception of the crossing of Spy run, where there has been changes, and I will not be positive about that.

304 Q. 43. Does Julia A. Freeman own the land adjoining the survey you have testified to on the north?

A. No; it belongs now to Fred. Eckert; I knew it was the property she owned at that time.

Q. 44. How do you know Julia A. Freeman owned said land at the time said description was made?

A. It was in her name on the tax duplicate; that was all the information I had; I saw her name on the tax duplicate, that was all.

Q. 45. Does not the road from Bloomingdale to Rudisill's mill, after crossing Spy run at its intersection with Elizabeth street, run in irregular curves northerly into Burgess avenue at its intersection with North Lafayette street?

A. Yes, sir; the building of the railroad and the enclosing of the property now owned by Mrs. Elizabeth Rudisill changed the course of the travel from the old Bloomingdale road.

Q. 46. Your said survey was made according to your theory as to what lands were included in the description you received from Mr. Coombs, was it not?

A. Yes, sir.

Re-examination by L. M. NINDE, Esq.:

Q. 47. You may state whether or not the Bloomingdale road, as marked out by you on said plat, was used as a public highway, and until Burgess, Zollinger, & Kamm laid out their said addition.

A. Yes, sir.

305 Q. 48. What do you know, if anything, as to Julia A. Freeman's ownership or occupancy of the land north of the land you describe?

A. Before making that survey I turned to the tax duplicate and found the land in her name.

WM. H. GOSHORN.

STATE OF INDIANA, }
Allen County, } *ss:*

I, George D. Crane, a notary public within and for said county and State, hereby certify that the above-named John A. Shoaff, Susan R. Shoaff, and William H. Goshorn were by me duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by me and Bayless Swift under my direction; that the said complainant and the defendants, Simons, Bass, Burgess, and the Kamms, attended by their respective attorneys, and said depositions were taken at the office of Coombs, Morris & Bell, in the city of Fort Wayne, county of Allen, State of Indiana, on the 14th and 15th days of June, 1880, between the hours of 8 a. m. and 6 p. m. of said days.

In testimony whereof I have hereunto set my hand and notarial seal this 29th day of June, A. D. 1880.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

Depositions of witnesses taken at the law office of Julius Robertson, at 304 Olive street, in the city of St. Louis, in the State of Missouri, in the case of George P. Bissell, trustee, against A. G. Barnett *et al.*, pending in the circuit court of the United States 306 for the district of Indiana, to be used on the trial of said cause, subject to all just exceptions and objections, whether formal or otherwise, the same being taken by agreement of parties.

WATSON WALL, being called as a witness by the defendants, Susan B. Shoaff and Mary A. Wall, and, being duly sworn to speak the truth, the whole truth, and nothing but the truth in said cause, testifies as follows:

Q. 1. State your name, age, residence, and occupation, and whether or not you are a party to this suit, and whether you are related to any of the parties; and, if so, how.

A. My name is Watson Wall; age, sixty-two years; occupation, that of book-keeper. I am a party to this suit. I am the husband of Mrs. Mary A. Wall, one of the defendants.

Q. 2. State when, if ever, you were informed or first ascertained that the defendant, A. G. Barnett, had executed on the record of the mortgage recorded in the Allen county records of mortgages in the office of the recorder of said county a release or discharge of a certain mortgage or a part thereof executed by Henry J. Rudisill and Elizabeth Rudisill, his wife, to your wife's brother, John H. Barnett; and, if you have knowledge of such release, state when you obtained it and how you obtained it.

A. The first information I got—I can't be precise as to time—was in the month of June or July, 1880. I did not mean 1880; it is utterly impossible. It was in June or July, 1879, from a 307 letter addressed to my son, Charles W. Wall, from John A. Shoaff, of Fort Wayne, wherein the said Shoaff speaks of this release of the fourteen acres.

Q. 3. To what release do you refer in the above answer?

A. To the release given by Barnett to Rudisill.

Q. 4. On what paper or book or in what office was said release executed, or of what mortgage, so far as you understood?

A. I don't know anything about that; I have no knowledge; I have never been informed.

Q. 5. What mortgage do you refer to as being released?

A. The fourteen acres held by —; I don't know who holds it, whether it is Bissell or Barnett; I don't know who holds the mortgage.

Q. 6. You must state whether or not you have had any notice of more than one such release.

A. The only notice I have ever had or knowledge is through the letter I spoke of as addressed to my son—that is, of the release of the fourteen acres.

Q. 7. What authority, if any, did you or your wife, so far as you know, give said A. G. Barnett to release said mortgage, or any part of it?

A. I gave none, nor my wife either, that I know of.

Q. 8. Where were you living from 1870 to the present time?

A. In St. Louis.

308 Q. 9. State whether your wife and family were also during that period residing in St. Louis.

A. I was residing here myself, but I don't know whether my wife was here or not.

Q. 10. What portion of said period, if any, did your wife reside at St. Louis?

A. I am stumped so far as dates are concerned; I forget what year she was in Canada. If I had an opportunity to refer to books I could tell you.

Cross-examination by S. R. Alden, Esq.:

Q. 11. Have you attended to your wife's interests in Fort Wayne, or has she attended to them herself?

A. She has attended to them herself entirely.

WATSON WALL.

Mary A. Wall, being called as a witness by the defendants aforesaid, testified as follows, being duly sworn to speak the truth, the whole truth, and nothing but the truth:

Q. 12. State your name, residence, whether you are a party to this suit, and what relationship do you bear to any of the other parties.

A. My name is Mary A. Wall; I reside at St. Louis, Missouri; I am fifty years old; I am a party to this suit; I am a sister to Mr. Barnett and of Mrs. Shoaff.

Q. 13. State when, if ever, you first learned of a release executed by your brother, A. G. Barnett, of a certain mortgage on thirteen or fourteen acres of land, given by Henry J. Rudisill and wife to your deceased brother, John H. Barnett.

A. I think it was in June or July, 1879, through Mr. Coombs, a lawyer.

309 Q. 14. State whether or not this is the first that you ever knew of any release executed by your brother, A. G. Barnett, of any mortgage executed to your deceased brother, John H. Barnett. Were there two releases executed, or was there only one? If but one give as full a description of it as you can.

A. I know of only one, and did not understand that fully until I went home and it was explained to me in September or August, 1879.

Q. 15. Where have you resided since January 1st, 1875?

A. In St. Louis.

Cross-examination by S. R. Alden, Esq.:

Q. 16. Were the relations cordial and intimate between yourself, your sister, Susan Shoaff, your brother A. G. Barnett, and your brother J. H. Barnett prior to the latter's death?

A. Yes, sir, as much so as they could be, my being separated from them.

Q 17. Where did your deceased brother, J. H. Barnett, live, and with whom, prior to his death?

A. Always at my brother Abraham's.

Q. 18. What were the relations between the two brothers as to their intimacy, mutual trust, and confidence?

A. I cannot answer that, for I don't know—always, so far as I could see, pleasant*ly*.

Q. 19. You saw them more or less often during the ten or fifteen years prior to J. H.'s death while they were living together?

A. Yes, sir.

Q. 20. So far as you could see, your deceased brother had implicit confidence in your brother Abe, with whom he lived, had he not?

A. Well, yes.

310 Q. 21. Were you present at the time of your brother's death?

A. I was not; I was in Canada.

Q. 22. How soon thereafter were you in Fort Wayne?

A. He died the 2nd; I received a dispatch and got in there the next day, the 3rd, as soon as I could go from Canada.

Q. 23. Did you at that time or soon after have any conference or discussion as to your deceased brother's estate with your brother Abe or with your sister Susan, or either of them?

A. No, sir. Just a day or so before I left they read a copy of the will, and there was no discussion at all; they did not know how much he was worth. I left within a week for Canada.

Q. 24. You understood from the will that the management of the estate was left in the hands of your brother Abraham, did you not?

A. I did.

Q. 25. And that he was to have the entire control and disposition of the personal estate of your deceased brother, as well as the management of your two sons' interest in the paper-mill?

(Counsel for the Walls and Shoaffs object to said question, because it refers to authority of A. G. Barnett under the will that the will in terms does not give him.)

A. Until they came of age, I so understood then, except that his management of the shares of my sons in the paper-mill should cease when they became of age.

Q. 26. You were satisfied with the powers given by the will as you then understood them, were you not?

A. I would rather not answer that unless I have to.

311 Q. 27. You made no objection at the time, did you?

A. I did not, because I did not know I had the power. The reason I have not answered the question — I thought it might reflect upon my brother Abe, as I only had a life interest.

Q. 28. Who did take charge of the estate and manage it after the death of your brother?

A. My brother Abraham.

Q. 29. Have you ever made any objections to his managing the estate?

A. I have within the last year for the first time.

Q. 30. Do you know John E. Hill?

A. Yes, sir.

Q. 31. Did you ever learn of his purchasing an interest in the mill property formerly owned by Henry Rudisill?

A. I never did until I went home last fall.

Q. 32. When did you first ascertain that there was any mortgage lien or trust deed encumbering your life estate in certain property of your deceased brother, J. H. Barnett?

A. The second year after he died.

Q. 33. State what you then learned, and how you learned it, with regard to anything concerning the estate of your deceased brother which you had not before known.

A. I cannot tell you how I first learned it; some one reported it to me. I wrote to my brother and he explained it by giving me the impression—at least I had the impression—that my brother Heuston had set aside property to pay this mortgage, and it was
only last year that I understood that it was the property of
312 Rudisill.

Q. 34. What did you previously suppose it to be?

A. Land that my brother had that was unimproved—wood land.

Q. 35. Where was this wood land situated?

A. I don't know that I can tell; some of it was above Rudisill's, in Allen county, Indiana, and I think he owns some south of Fort Wayne, called the Spring Place by the Barnetts.

Q. 36. Who owns this property that you speak of that was set aside, as you supposed, for the purpose of paying off the Bissell mortgage?

A. I did not know that it was Bissell, in the first place, that owned the mortgage, but this property was property of my deceased brother Houston. My brother Abe was not very communicative about business matters.

Q. 37. How did you come to understand that the property you speak of was set off for that purpose?

A. From a letter I had from my brother Abraham.

Q. 38. Have you corresponded with your brother Abraham during the past seven or eight years?

A. I have.

Q. 39. Have you visited Fort Wayne several times during the past ten years?

A. I have.

Q. 40. Did you know that your brother Abraham bought and improved a lot in Lindenwood cemetery, and erected a monument on the same, and removed the remains of your parents to that lot?

A. I did; and knew that at the same time he removed
313 the remains of my baby there.

Q 41. Were you satisfied with what he did in that and other respects as to the estate of your brother?

A. Yes; in that.

Q 42. State when, if ever, you have expressed any dissatisfaction with his action in regard to the estate of your deceased brother.

A. When he released the mortgage of Mr. Rudisill.

Q 43. You were dissatisfied with that at the time, were you?

A. I did not know it at the time. I never heard of till last August.

Q 44. Do you know whether your brother Abraham received any consideration for the release you speak of?

A. No, sir. I know nothing about the affair at all.

Q 45. Was not your dissatisfaction the result of consultation with counsel?

A. No, sir; I had not seen any counsel then.

Q 46. To whom did you first express your dissatisfaction?

A. I don't know that I ought to answer that. To my sister.

Q 47. From whom did you get the information that made you dissatisfied?

A. From a letter from Mr. Coombs telling me of the mortgage being set aside—not really giving me any insight into the matter.

By Mr. Coombs:

Q 48. Do you mean Bissill's attorney?

A. Yes, sir.

Q 49. Have you that letter in your possession?

A. Yes, sir.

314 Q 50. Produce this letter and authorize the notary to mark it and identify it and annex it to this deposition.

(Counsel for Mrs. Wall agrees to produce the letter on request the same as if it was attached.)

Q 51. Who looked after your sons' interests in the paper mill for them?

A. I suppose my brother.

Q 52. Did your brother report to you or to your sons concerning their interests?

A. I don't know. He never did to me, and I don't know that [he] ever did to them. I don't know anything about it.

Q 53. Have you in your possession the letter written you by your brother Abraham informing you, as you say, that certain real estate had been set aside to protect your interests in your brother's estate from the Bissell mortgage?

A. No, sir; I have no such letter. I have a letter telling me that in regard to that mortgage I need not worry, as he had land that I could sell, or he would for me, when the mortgage was foreclosed.

(Counsell for Mrs. Wall agrees to procure the possession of that letter and to bring it and keep it at Fort Wayne to be dealt with the same as if it were produced before the officer here.)

Q 54. When did you receive this letter from your brother Abraham informing you of a lien on your interest in your deceased brother's estate?

A. In 1873, I think, but even then I did not understand

315 that Bissell had anything to do with it. I thought it was

some of the men there at Fort Wayne who had money to loan. I never knew until a year ago that it was borrowed in New York.

Q. 55. You left the care of paying and satisfying said lien to your brother Abraham, did you not?

A. I did; as he assured me that I need not be worried about it, as it had a run of ten years, and he would see to that.

Q. 56. You were satisfied to allow him to see to it, I suppose?

A. Yes, sir.

Q. 57. Did or did you not inform him that you were satisfied?

A. I don't know that I did anything at all; I think I just rested there on his statement, thinking that he was just as much interested as I was.

Q. 58. And you expected him to attend to the matter for you, without any further authorization on your part, did you not?

A. I did.

Q. 59. Did you know anything about the failure of Freeman and Barnett at the time it occurred?

A. I did learn of it through the public press.

Re-examination by L. M. NINDE, Esq.:

Q. 60. What did you say, if anything, to your brother Abraham in answer to his statement to you that he would see to the mortgage on your property, and have it paid, and that you need not worry about it? If you said nothing say so.

316 A. I can't recollect of ever having had any conversation with him about it when I was at home, as I took it for granted it would be all right.

Q. 61. You may state whether his communication to you that he would see to the mortgage on your property, and have it paid, and that you need not worry about it, was by words or by letter.

A. It was by letter.

Q. 62. At what date, as near as you can say?

A. I think it was in 1873; I believe in the spring.

Q. 63. Did you give him any written authority to act for you? If so, state when, where, and what it was.

A. I don't remember now of any time, but in paying taxes and insurance; I think it was the first or the second year I had the store; he would advise me, but he did not want to act himself; he said he would advise me as to taxes, renting the property, or insurance, but did not want to act himself, after the first — I had been in possession.

Q. 64. What do you mean as to the time he proposed to advise with you, but not to act for you?

A. Some time during the first year I came in possession; I can't tell you how long it was.

Q. 65. How long did he continue advising with you as to the renting, taxes, and insurance after you came into possession?

317 A. Well, as near as I can tell I had to go on to make a lease. I think it was in the fall after I came into possession. Then I had to make out a lease. He advised me who to get. There were three applicants, and he advised me which of those three

to take, and then he bought orders for me two or three times, and the insurance, he paid it once or twice for me. Since then I paid it to Fisher, Bissell's agent, I since learned he was. Since this suit was instituted I never could tell before why I was paying it to Fisher.

Q. 66. Had your brother Abraham any authority from you whatever to act for you in reference to your property in Fort Wayne or to release the Rudisill mortgage after you came into possession of the property devised to you by your brother?

A. No, sir; he never has advised with me at all.

Q. 67. Who has collected the rents since you came into possession of the store?

A. The tenants send it right direct to me.

Recross-examination by S. R. ALDEN, Esq.:

Q. 68. When did you first learn, as you suggested, that you could contest the will or the exercise of the powers that you supposed had been given by it?

A. I have never learned that I could as yet contest the will.

Q. 69. You must state to what you referred in your remark that you did not then know that you could contest it.

A. I don't understand that.

Q. 70. Do you, then, still suppose that your brother Abra-
318 ham has under the will the entire control and disposition of
the personalty of your deceased brother?

A. I don't think he had any right to release a mortgage that my brother had executed himself without consulting the rest of us—my sister and myself.

Q. 71. You have said that you supposed at the time the will was read in your presence that your brother Abraham had the entire control and disposition of your deceased brother's personal estate. Do you still think so? If not, when did you change your mind?

A. I don't know that I have changed my mind. I still think that he is the only one who is benefitted by the will, as all the property goes back into his own family.

Q. 72. You still think, then, that the will did give him entire and exclusive control of the personalty?

A. He had very little personal property, and I think he had — of that.

MARY A. WALL.

The certificate of the officer who took the foregoing depositions is, by agreement, waived, and it is admitted that all the adverse parties appeared, by counsel, and made the foregoing cross-examination, and it is further agreed that the foregoing depositions shall be read in evidence on the trial of said cause the same as if notice and dedimus had been duly served and issued, and a due and formal certifi-
cate of the officer hereto attached, but all just exceptions and
319 objections are reserved.

TAYLOR & MORRIS,
Solicitors for Simons & Bass.

Letter Referred to by the Witness, Mary A. Wall, in Her Answer to Question No. 50.

FORT WAYNE, *June* 9, 1879.

Watson Wall, Esq., St. Louis, Mo.

DEAR SIR: We are informed by Judge Taylor that you and your wife sent him a power of attorney to appear for you in the case of George P. Bissell *vs.* Abraham G. Barnett and others, but that he, having been employed by other parties in the case, *he* cannot appear for you. The facts in the case are these: John H. and A. B. Barnett borrowed $8,000 from Bissell, which was secured by a mortgage on two lots in Fort Wayne. Henry Rudisill took $5,000 of this money and mortgaged his mill to secure the payment of the $5,000. We commenced a suit for Bissell to foreclose the Barnett mortgage, but we thought it would be a hardship on the devisees of John H. Barnett (your wife being one). At the request of the other devisees we also ask a foreclosure of the Rudisill mortgage, and an order that his property be first sold to make the $5,000 and interest, before the Barnett lots could be sold; otherwise the Barnett lots would have to be sold for the entire debt. By this arrangement we think the property in which your wife is interested can be saved. Taylor
has been employed by parties who have purchased some of
320 the property mortgaged by Rudisill, and is seeking to make
us sell the Barnett property to make the whole debt. We
were obliged to make you and your wife parties to the suit, and from this statement you will see that it is for your interest that the Rudisill property should pay the greater part of this debt. There will be nothing for you to do in the case but to enter an appearance and ask that your rights be protected. If you do not appear we will have to have you served with process, which will cause considerable expense, which we want to avoid. If you will authorize Charles Aldrich, Esq., a former student of ours, to appear for you we will see that it costs you nothing, and we will guarantee that your rights in the case will be protected. We enclose a power of attorney with a blank, which you can fill with the name of Charles Aldrich, or any other attorney here except Withers, who is the attorney for Rudisill. We hope you will execute this and return it to us, and thus save delay and a considerable bill [of] costs.

Yours truly, COOMBS, MORRIS & BELL.

Letter Referred to by the Witness, Mary A. Wall, and Called for in Question No. 53.

FORT WAYNE, IND., *April* 8, 1873.

DEAR SISTER: I received yours last Saturday, and supposed I had answered your enquiry about the mortgage, but perhaps I did not,
in my letter to you; it was a mortgage on his store to secure
321 $5,000, which he is secured on a piece of land worth $10,000,
but in the loan it was stated that the store was to be insured
and kept so until the money was paid. You need not borrow any trouble that the mortgage will be foreclosed, for, if they do, you can

commence on the land or I will for you. Wall wrote me a very insulting letter about the money coming to you after the debts were settled, which I would never answer. I know this much, that Huston never intended that he should receive anything from him, knowing what Wall had said in regard*ing* to him, because father had given him more than the balance of us, and if he had spent his property, as some of the rest —, this letter need never been written.

Now Mary I will, so far as you are concerned, *I will* make a statement: The monument is not completed, and I cannot get a voucher to settle the estate in court, which will be done in May or June, when I will send you a copy; but taking *as* an estimate of the court costs at $25.00, January 1, '73, I had in my hands 91.87—

Your share of it		59 11
Rent Jan'y, Feb'y, & March		200 00
		259 11
Cr.		
By paid Jas. Wall	15 00	
" " draft, 25.35; ex. 10c.	25 45	
" " insurance	75 00	
" " city tax	105 00	
" " county "	54 78	
		275 23
Leaving a bal. due me on April 1, '73, of		16 12

322 This may vary a little when the final settlement is made; so you see, Mary, I have not had one dollar of your money to use very long. I think to- much of you and your children to cheat you. If I had not had such bad luck I could have he*a*lped you often. As far as the property given to my children I never expect it to help me support or educate them. I will have to do that myself. No- do I wish it, as I hope you and Susan may long live to use it yourselves.

Mary, I do not intend to have anything more to do with that store; not that I feel that I have done anything wrong, but that no person not knowing me can say that I used your money. Any time you wish advice, and think it is worth anything, I will give it to you. You can draw the rent for April, but as yet I have no power to hand over the property until the court settles with me. I went to see Dr. Irwin about your life insurance, but he was not at the bank. Will see him — how long he can carry it. If I can do anything about it satisfactory to — I will do so. He will not have to make his report to the head office until the first of May, and then he can have part of it, and I will fix it so you can pay the bal. in June or July. Give my love to all the children. This is the longest letter I have wrote in a long time. Hope you can read it.

Your brother,
ABE.

323 P. S.—Lib. is a good correspondent. I turn that over to her.
ABE.

And the court, after hearing the proofs and the argument of counsel, and being fully advised in the premises, finds that the equity is with the complainant, and also with the cross-complainants, Barnetts, Wall, and Shoaff.

That on the 15th day of July, 1869, John H. Barnett, Abraham G. Barnett, and Henry J. Rudisill borrowed from the complainant eight thousand dollars ($8,000); that to secure said loan said John H. and Abraham G. Barnett at the same time executed to the complainant, jointly, eight bonds for one thousand dollars each, with coupons thereto attached bearing interest at the rate of nine per cent. per annum, payable semi-annually on the 15th day of January and July of each year; that by reason of the non-payment of certain of said interest coupons the whole of said debt so evidenced by said bonds has been and remains due the complainant.

324 That to further secure said loan said John H. Barnett at the same time executed to the complainant his certain deed of mortgage upon the real estate therein described, to wit: The following-described real estate in the city of Fort Wayne, Allen county, Indiana: All of lot one hundred and five (105) on the original plat of the town of Fort Wayne, except a strip off the east side of said lot, ten (10) feet in width, running from front to rear thereof, and part of lot one hundred and six (106) on the same plat, commencing at a point on the east line of said lot thirty (30) feet south of the northeast corner thereof; thence running south along said line twenty (20) feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty (20) feet; thence east at right angles therewith to the place of beginning; and that at the same time the said Henry J. Rudisill executed to the said John H. Barnett his penal bond in the sum of ten thousand dollars ($10,000), conditioned for the payment to the complainant of five thousand (5,000) dollars of the said loan of eight thousand (8,000) dollars.

That said Rudisill having received five-eight-s ($\frac{5}{8}$) of said laon, he, the said Rudisill, at the same time agreed to execute and deliver to the said John H. Barnett to secure to the complainant the payment of five thousand (5,000) dollars and the interest thereon of said loan of eight thousand (8,000) dollars, his mortgage upon the following-described real estate, situate in Allen county, Indiana, to wit:

325 All that portion of the fractional southeast quarter ($\frac{1}{4}$) of section thirty-five (35), township thirty-one (31), range twelve (12) east, bounded on the east by the St. Joseph river, south by the Bloomingdale road, west by the feeder to the Wabash and Erie canal and on the north by the lands of Julia A. Freeman, *i*stimated to contain thirteen (13) acres.

That in pursuance of said agreement, on the 13th day of December, 1871, said Rudisill and wife did execute and deliver to said John H. Barnett their deed of mortgage upon the real estate last hereinbefore described to secure to the complainant the performance of said agreement and of the conditions of the said bond of said Rudisill.

That said John H. Barnett died testate on the 23rd day of January, 1872, seized in fee of the real estate described in his said deed of mortgage to the complainant, having nominated by his said will said Abraham G. Barnett as his executor.

That by his last will and testament, which was duly admitted to probate, the said John H. Barnett devised to his sister, the said Mary Ann Wall, a part of said lot number one hundred and six (106) in the old plat of Fort Wayne, being a part of the premises so mortgaged to complainant as aforesaid for life, remainder in fee to Byron Huston Barnett, son of the said Abraham G. Barnett, in case the said Byron Huston Barnett should survive the said Mary Ann Wall; and in case he should not so survive and dying without issue
326 living, then the remainder in fee to said Abraham G. Barnett and his heirs.

That by his said last will and testament said John H. Barnett devised to his sister, Susan Barnett Shoaff, said lot one hundred and five (105) on the old plat of Fort Wayne, being the same so mortgaged as aforesaid to the complainant, for life, remainder in fee to James William Barnett, son of the said Abraham G. Barnett, in case the said James William Barnett should survive said Susan Barnett Shoaff; if not, to his child or children living; and if none such, then remainder in fee to said Abraham G. Barnett.

That on the 23d day of January, 1875, said Henry J. Rudisill and wife, by their deed of that date, conveyed to said Henry Burgess, Charles A. Zollinger, and John J. Kamm all that part of the real estate described in the mortgage of said Rudisill and wife to said John H. Barnett, described as follows, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot eight (8) of Wells' pre-emption, all in township thirty-one (31) north, of range twelve (12) east, more particularly described as follows, viz: Commencing two (2) feet east of the southwest corner of lot number one (1) in Eckart's addition to Fort Wayne, in said section 35; thence west along the south line of said addition to the water line of the feeder to the Wabash and Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Ft. Wayne, Jackson & Saginaw railroad; thence southeasterly along the said right of way to the center of the Bloomingdale road; thence
327 northeasterly with the center of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot (11) in Rudisill's subdivision of part of lot eight (8) of Wells' pre-emption; thence northerly at right angles to said street 343 feet; thence easterly parallel with said Elizabeth street 387 feet to the west line of the St. Joseph road; thence northerly with the line of said road 312 feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning, saving and excepting that when said tract is subdivided into lots, an alley twelve (12) feet wide must be left on the south and west sides of the lot occupied as a miller's residence, and also that a street 50 feet wide shall be left on the north and west sides of the tract of land now owned and occupied by Elizabeth Rudisill, the undivided one-half of said premises being con-

veyed by said deed to said Burgess and the other half to said Zollinger and Kamm.

That the real estate mortgaged by the said John H. Barnett to the complainant is primarily liable for three-eight-s ($\frac{3}{8}$) of said loan of $8,000.00, and the real estate so mortgaged as aforesaid by said Henry J. Rudisill and wife to said John H. Barnett is liable for five-eight-s ($\frac{5}{8}$) of said loan of $8,000.00.

That as to the complainant and the said devisees, Mary Ann Wall, Susan Barnett Shoaff, Byron Huston Barnett, and James William Barnett, the mortgage of said Henry J. Rudisill and 328 wife to said John H. Barnett, dated the 13th day of December, 1871, remains in full force and unprotected by the effort of the said Abraham G. Barnett to satisfy, release, and discharge the same, but that the said Abraham G. Barnett, one of the devisees of the said John H. Barnett, is estopped from claiming, as against the grantees of said Henry J. Rudisill, or any person claiming under them, that the real estate mortgaged as aforesaid by said Henry J. Rudisill and wife to said John H. Barnett should be sold to pay any part of the said loan found to be due the complainant.

That so much of the real estate embraced in the said mortgage of the said Henry J. Rudisill and wife to said John H. Barnett as was not conveyed to Burgess, Zollinger, and Kamm should be first sold to pay the amount found due from the said Rudisill to the complainant, and if said real estate not conveyed to Burgess, Zollinger, and Kamm should not sell for enough to pay the amount found due from said Rudisill to the complainant and five-eight-s ($\frac{5}{8}$) of the costs of this suit: that the balance of said real estate, to wit, that part conveyed to Burgess, Zollinger, and Kamm, shall be sold to pay the residue of the amount remaining due from said Rudisill to the complainant.

That any sum which the said Burgess, Zollinger, and Kamm, or either of them, or any of the present owners of any of the real estate so conveyed as aforesaid to said Burgess, Zollinger, and Kamm 329 by said Henry J. Rudisill may pay on the amount found due from said Rudisill to the complainant to protect the property of the person or persons so pledging the same from sale under any decree that may be rendered herein shall be and remain a lien and charge in favor of the person or persons so paying the same upon the contingent remainder in fee of said Abraham G. Barnett in the lands so devised to him as aforesaid; and that in case the interest of any of the present owner or owners of any of the lands so conveyed as aforesaid by said Rudisill to said Burgess, Zollinger, and Kamm shall be sold under any decree herein to pay any sum which may be found to be due from said Rudisill to said complainant then the value of the property so sold, to be estimated by the bid therefor, shall in like manner be and remain a lien or charge, in favor of the present owner thereof upon the said contingent remainder in fee of the said Abraham G. Barnett.

In case the entire real estate so mortgaged as aforesaid by said Henry J. Rudisill and wife to said John H. Barnett for the benefit of the complainant shall not sell for a sufficient sum to pay five-eight-s ($\frac{5}{8}$) of the whole amount found due the complainant, together with five-eight-s ($\frac{5}{8}$) of the costs of this suit, then the lands embraced in the mortgage of the said John H. Barnett to the complainant shall be sold to pay any residue due from said Henry J. Rudisill to the complainant, as well as the three-eight-s ($\frac{3}{8}$) of said loan due to the complainant from the said Barnetts.

330 And afterwards, to wit, at the November term of said court, on the 9th day of March, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and file stipulations herein in the words following, to wit:

In the Circuit Court of the United States in and for the District of Indiana.

George P. Bissell *vs.* Abraham G. Barnett *et al.*

It is hereby mutually stipulated and agreed by and between the respective parties to the above cause, appearing by their solicitors herein, that exceptions to the interlocutory decree of February 10, 1881, herein, as well as all pleadings and proofs by the agreement therein referred to, shall be taken, filed, and presented, at the latest, during the June session of this court at Fort Wayne—sooner should the taking of testimony be completed at Indianapolis—and that said cause be submitted at said session for final hearing and decree upon the papers, entries, and evidence heretofore and up to said session so taken, filed, entered, produced, made, and brought before this court without further delay. Should the judge not attend at said term at Fort Wayne, or for any other reason should the case not be disposed of at Fort Wayne at said session, the case shall be immediately heard at Indianapolis the fourth week in June.

331 COOMBS, MORRIS & BELL,
Solicitors for Complainant.
TAYLOR & MORRIS,
Solicitors for Bass & Simons.
NINDE & ELLISON,
Solicitors for the Barnetts, Shoafs, & Walls.
SAMUEL R. ALDEN,
Solicitor for Burgess & the Kamms.
W. H. WITHERS,
Solicitor for the Rudisills.

And afterwards, to wit, at the May term of said court, on the 3rd day of May, A. D. 1881, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by their respective solicitors, and file their agreement for the transfer of this cause to Fort Wayne, in the words following, to wit:

In the U. S. Circuit Court. In Chancery.

George P. Bissell *vs.* Abraham G. Barnett *et al.*

It is agreed that said cause be transferred to Fort Wayne.

NINDE & ELLISON,
Solicitors, &c.
TAYLOR & MORRIS.
COOMBS, MORRIS & BELL.
S. R. ALDEN.

And thereupon it is ordered that the above-entitled cause be, and the same is hereby, transferred to the docket of causes at Fort 332 Wayne, and the clerk is directed to transmit the papers, together with a certified copy of the proceedings herein, to the clerk at Fort Wayne.

United States of America, }
District of Indiana, } *ss:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings in the cause of George P. Bissell *v.* Abraham G. Barnett *et al.*, in said court at Indianapolis, as fully as the same appears of record in my office.

Witness my hand and the seal of said circuit court at Indianapolis, in said district, this 6th day of May, A. D. 1881.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

And at the same time, to wit, on the 7th day of May, A. D. 1881, the following further proceedings in the above-entitled cause were had, to wit:

Comes now said defendant, Abraham G. Barnett, by Ninde & Ellison, his solicitors, and files herein his cross-bill, with exhibit thereto, marked "A," in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Humbly complaining, showeth unto your honors, your orator, Abraham G. Barnett, who brings this bill of complaint, that George P. Bissell, one of the defendants hereto, on the — day of ——, 1879, filed his bill of complaint in this court against your orator 333 and John A. Shoaff, Susan B. Shoaff, Mary A. Wall, and Watson Wall, Byron Heuston Barnett, James William Barnett, Oscar A. Simons, John H. Bass, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, the widow and children of John J. Kamm, deceased, Henry J. Rudisill, and Elizabeth Rudisill, his wife; Andrew Huffmeister, Mary J. McCurdy, and Alfred Hattersley, who are also made defendants hereto, and others, in which bill of complaint the said Bissell, among other things, prayed the foreclosure of a certain mortgage executed on the 15th day of July, 1869, by John H. Barnett, late of said district, since deceased, to him, the said Bissell, to secure eight coupon bonds for $1,000 each, executed by said decedent and your orator to said Bissell. A copy of said mortgage and also of said bonds and the coupons thereto attached are made exhibits to said bill, in which said mortgage premises are duly described as follows, to wit: All of lot 105 in the original plat of Fort Wayne, except a strip ten feet wide off the east side thereof; also part of lot 106 in said original plat, commencing at a point on the east line of said lot, thirty feet south of the northeast corner thereof, running thence south along said line twenty feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty feet; thence east at right angles therewith to the place of beginning.

334 And your orator further shows to your honors that at the time that said John H. Barnett, deceased, so executed said mortgage to secure said eight bonds and the coupons thereto attached it was understood and agreed by and between said decedent and the said Bissell and said H. J. Rudisill that $5,000 of said sum so borrowed of and secured to said Bissell was borrowed for said Rudisill, and he was to, and then and there agreed with said decedent and the said Bissell, *to* repay to the plaintiff the said amount of said loan, and then and there executed to said decedent his penal bond in the sum of $10,000, conditioned that upon the payment of $5,000 of the said bonds so executed to the plaintiff by said decedent and your orator, with the interest thereon as it became due according to the tenor and effect of said bonds, the said bond should become void, else be and remain in full force—a full description of which bond and the conditions thereto annexed is set forth in the plaintiff's said bill of complaint, and a copy thereof filed therewith and attached as an exhibit thereto, all of which are by incorporation made part of this bill of complaint: that at the same time when said loan was made and said Rudisill received $5,000 thereof and executed said penal bond for $10,000 to said decedent he agreed to execute to said decedent a mortgage on certain real estate hereinafter described, to secure the due and faithful performance of said bond and the payment of the money as therein stipulated,
335 and that afterwards, to wit, on the 13th day of December, 1871, in pursuance of said agreement, and as additional security for the payment of said $5,000 and the bonds so given by said Barnett to secure the same, the said Henry J. Rudisill and Elizabeth Rudisill, his wife, did execute and deliver to the said decedent, for the benefit and protection of said decedent, and to secure the payment of said $5,000 to said plaintiff, a mortgage deed conveying to said decedent the land therein described, to wit, all that portion of the fractional southeast quarter of section thirty-five, township thirty-one north, of range twelve east, bounded on the east by the St. Joseph river, south by the Bloomingdale road, west by the feeder of the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman, which mortgaged premises are more particularly

described as follows, to wit: Commencing at the intersection of the east line of the Wabash and Erie canal feeder with the south line of section 35, township 31 north, of range 12 east, of second principal maridian; thence north 86 degrees east along the south line of said section 35 nine (9) chains to the intersection of the centre line of the old Bloomingdale road; thence north 60½ degrees east along the centre line of said Bloomingdale road 13.50 chains to the right bank of the St. Joseph river; thence north twenty-three degrees west along said right bank of said river three and sixty-six hundredths (3.66) chains; thence south eighty-six degrees
336 west 15.30 chains to the Wabash and Erie canal feeder;
thence southwesterly along said canal feeder to the place of beginning, containing fourteen (14) acres, more or less.

And your orator further shows unto your honors that as to said sum of $5,000, part of said sum of $8,000 so loaned by the plaintiff and secured to him by said eight bonds and mortgage deed executed by said decedent, the said decedent was only the surety of said Henry J. Rudisill, and the said portions of said lots 105 and 106 so mortgaged to plaintiff by said decedent were only so mortgaged as surety for said sum so loaned by the plaintiff so far as the said $5,000 thereof so received by said Rudisill was concerned, and that as to said $5,000 the said Rudisill was and is the principal debtor, and the said premises so mortgaged by him to said decedent was the principal fund and security out of which said sum of $5,000 was to have been paid; that said Rudisill has wholly failed and refused to pay said sum of $5,000 or any part thereof, and has failed to pay the interest thereon falling due as in said plaintiff's said bill of complaint alleged, whereupon the plaintiff and the holders of said bonds declared them due and payable, and the plaintiff instituted this suit to collect the same and to foreclose said mortgage so executed to him by said decedent.

And your orator further shows unto your honors that the said John H. Barnett died testate on the — day of ——, 1872, and
337 by his last will devised that portion of lot 106, in the city of
Fort Wayne, described as aforesaid, to said Mary Wall for life; remainder to Byron Hueston Barnett, if living at the death of said Mary, or to his children, if any living at the death of said Mary; remainder, in case the said Byron Hueston or any child or children of his shall not be living at the death of said Mary, to your orator and his heirs in fee-simple.

And your orator further showeth unto your honors that by said last will the said John H. Barnett devised said premises in lot 105 to said Susan B. Shoaff for life; remainder to James William Barnett if living at the death of said Susan, and if not remainder to any child or children of said James William if living at the death of said Susan, but in case none of such devisees are living at the death of said Susan then and in that case the said testate by said will devised said premises to your orator in fee-simple.

And your orator further avers that said will was duly probated and proven before the Allen — circuit court on the — day of February, 1872; that said testate by and in said will nominated your orator as his executor.

And your orator further showeth unto your honors that he never took out letters testamentary nor qualified as the executor of said will, but through ignorance supposed he was duly authorized to discharge the duties of such executor without such letters testamentary or qualification as such executor; that, assuming to exercise
338 such power as executor, your orator did, on the 23rd day of
January, 1875, upon the request of said Henry J. Rudisill and the said Burgess, Zollinger, and John J. Kamm, deceased, release said mortgage upon the record thereof in the recorder's office where the same was recorded, upon the agreement then and there procured by the said Rudisill by fraud and falsehood, as follows: That the said H. J. Rudisill, to procure your orator to release said mortgage as aforesaid, proposed to your orator to execute to him as such executor a first mortgage upon the following-described real estate, to wit: All that tract of land known as the St. Joe mills property, in section 35, township 31 north, of range 12 east, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption; thence with the centre of the St. Joe road northerly to a point to where the St. Joe turnpike intersects the same; thence easterly along the centre of said turnpike to the west quarter-post of section 36, in said township and range; thence southeasterly with the eastern boundary of said mill site to the bank of the St. Joe river; thence westerly with said river to the place of beginning, containing 15 acres, more or less, all in said county of Allen and State of Indiana, which premises were of great value, and, if free from encumbrance, would have been ample security for the sum proposed to be secured by such mortgage; that said Rudisill, to procure your orator to so release said
339 mortgage upon the record thereof that was so executed by him
to said Barnett, represented to your orator that said mill property was free and clear from all liens and encumbrances, and, believing that such representations were true, he so released said mortgage upon the said premises so given to said Barnett, deceased; that upon such release being so entered by your orator, said Henry J. Rudisill and said Elizabeth Rudisill, his wife, executed said mortgage to your orator upon said mill property described as aforesaid to secure said bond so executed by him to said J. H. Barnett, deceased, and which said mortgage was duly recorded upon the records of mortgages in the recorder's office in said Allen county, on the 26th day of January, 1875, a duly certified copy of the record of which mortgage and the record thereof is filed herewith and marked Exhibit "A," and made by incorporation, a part of this bill of complaint.

And your orator further avers that said defendants, Oscar A. Simons and John H. Bass, claim that prior to the time said mortgage was so executed to your orator, under the representation of said Rudisill that it was and would be a first lien upon said mill property as aforesaid, that he, the said Rudisill, had executed to said Elizabeth Rudisill, the mother of said Henry J. Rudisill, a prior mortgage upon said premises to secure to his said mother the performance of some certain conditions in some bond theretofore 340 executed by him to her, which conditions required, as said Bass and Simons claim, the payment by said Henry J. Rudisill to his said mother certain sums of money from time to time for and during her natural life, in the nature of an annuity, but how much and upon what conditions your orator is wholly ignorant, and that said Elizabeth Rudisill has sold and transferred said mortgage and bond to them, the said Bass and Simons, and that some of such installments are due and unpaid, but how much or how many your orator is wholly ignorant.

And your orator further avers that after the execution of said mortgage by said Rudisill to him on said mill property the said Rudisill conveyed his equity of redemption therein to said defendants, John E. Hill and one Eliza Rudisill, who conveyed the same to one George Esmond, who now holds the legal title thereto and who is made defendant hereto. But your orator avers and charges that said Esmond took said conveyances from said Eliza Rudisill and John E. Hill as trustees only of said Bass and Simons, and not otherwise; that said Bass and Simons paid the purchase-money for said property and caused the deeds to be made to said Esmond upon some secret understanding or arrangement with him to hold the same in trust wholly for them, said Bass and Simons, but 341 precisely upon what understandings and agreements your orator is ignorant and unable to aver; but your orator charges that the purpose of said parties in so placing said deed in the name of said Esmond was, among other things, to conceal the interest of them, the said interest of said Bass and Simons, and their ownership of the said equity of redemption in said mill property to prevent an equitable application of the rents and profits arising therefrom to the payment and liquidation of the sum or sums of money due and falling due upon such annuity mortgage. But your orator expressly charges that said Bass and Simons, as the real parties and *cestui que trusts* in interest under said deed to said Bass and Simons, have been in possession of said premises so conveyed to said Esmond ever since said deeds were so executed to him or allowed him, the said Esmond, to hold possession of the same wholly for them and for their interest and benefit, and that they have derived large profits from said mill property, which they have failed and wholly refused to apply to the payment of any installment that may be due or falling due upon said annuity mortgage. And your orator further avers that said property is, and has been ever since the said deeds were so executed to said Esmond by said Hill and Rudisill, fairly worth in annual rent in the market more than two thousand dollars a year, and that said defendants, Bass, 342 Simons, and Esmond, if they have not, ought to have caused said property to produce such amount, and said mortgage so held by said Bass and Simons ought and should be credited with said sums, since the conveyances were so executed to said Esmond as aforesaid; and he further shows to the court that he is ignorant of the time and date of said deeds so executed to said Esmond and requires the said defendants in answering this bill to state the date thereof.

And your orator further charges that there is not now due upon said mortgage so executed to said Elizabeth Rudisill more than two thousand dollars.

And your orator further shows to the court that said mortgage to said Elizabeth Rudisill does not cover nor include all said mill property so conveyed to said Esmond and so mortgaged to your orator; that said annuity mortgage covers only that portion of said mill property lying in said section 35, and none thereof lying in section 36 in said township and range upon which your orator avers and charges he has and holds by virtue of his said mortgage a first lien on said portion of said property as lies in said section 36, which is described as follows, to wit, the following real estate in Allen county and State of Indiana, and described as follows, to wit: Beginning three chains and 46 links south of the east quarter-post of section 35, township 31 north, of range 12 east, at a stone;
343 thence 4 degrees east 8 chains to the line of low-water mark;
thence south 39 degrees east 5 chains; thence south 74 degrees east 3 chains; thence north 82 degrees east 6 chains and 12 links; thence north 12¼ degrees east one chain and 45 links to a stone; thence north 65½ degrees west 11 chains and 50 links; thence north 23½ degrees west 6 chains and 10 links to the place of beginning; containing 5.47 acres, more or less.

And your orator further charges that in equity the said Henry J. Rudisill is the principal debtor to said Bissell as to the sum of five-eight-s (⅝) of said mortgage debt so held by said Bissell, and the said mill property so mortgaged to your orator is the primary fund out of which five-eight-s of said debt to said Bissell should be made and paid before your orator's said interest in said property so mortgaged by said John H. Barnett to said Bissell to secure the same ought in equity to be sold to pay said portion of said debt, yet so it is in violation of your orator's said equitable rights the said Bissell is proceeding by his said suit in your honor's court to seek to realize his said debt out of and to wholly make the same of and from the said property covered by said mortgage so executed by said John H. Barnett to him, all of which is contrary to equity and good conscience and to the great injury of your orator and his rights and equities in the premises.

344 In tender consideration whereof, and for as much as your orator has no remedy without the assistance of a court of equity where matters of this nature are cognizable: To the end, therefore, that the defendants may respectively full, true, direct, and perfect answer make upon their respective oaths, according to the best of their respective knowledge, information, and belief, to all and singular the charges and matters aforesaid as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated. And that the defendant Bissell be compelled by a decree of this court to prosecute his suit for the foreclosure of the said mortgage so executed by the said Henry J. Rudisill

and wife to your orator for the recovery of said sum of five-eight-s of his said debt and interest, attorneys' fees, and costs thereon accrued and to accrue, and for said sum, and that all of said sums, when so recovered, may be applied by said Bissell in liquidation of said mortgage-debt so held by said Bissell, and that said defendants Bass, Simons, and Esmond may be decreed to pay to the plaintiff Bissell said sums, and interest and costs equitably apportioned thereto, or in default thereof the said property so mortgaged to your orator may be decreed to be sold to pay the same before your orator's said interest in said property so mortgaged to said Bissell be
345 decreed to be sold therefor, and that your orator may have
such other and further relief in the premises as the nature of his case and equity requires. Therefore will your honors grant unto your orator the writ of subpœna issued out of and under the seal of this court, to be directed to said defendants, George P. Bissell, Oscar A. Simons, John H. Bass, George Esmond, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Henry J. Rudisill, Elizabeth Rudisill, his wife; Elizabeth Rudisill, Andrew Huffmeister, Mary J. McCurdy, and Alfred Hattersley, commanding them and each of them by a certain day therein inserted to appear before your honors in the circuit court of the United States for the district of Indiana, and then and there answer the premises and abide the order of the court.

NINDE & ELLISON,
His Solicitors.

EXHIBIT "A."

This indenture witnesseth: That Henry J. Rudisill and Elizabeth E. Rudisill, his wife, of Allen county, in the State of Indiana, mortgages and warrants to Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased, of Allen county, in the State of Indiana, for the sum of one dollar, the following real estate situate in Allen county and State of Indiana, and described, to wit: All that
346 tract of land known as the St. Joe mill property, in section
35, township 31 north, of range 12 east, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption; thence with the centre of the St. Joe road northerly to a point to where the St. Joe turnpike intersects the same; thence easterly along the centre of said turnpike to the west quarter-post of section 36, in said township and range; thence southeasterly with the eastern boundary of said mill site to the bank of St. Joe river; thence westerly with said river to the place of beginning, containing 15 acres, more or less, to secure the payment of the amount annexed and the performance of the conditions recited in a certain bond executed by Henry J. Rudisill to John H. Barnett, dated July 15, 1869, and recorded in the miscellaneous record No. 6, page 236, of the records of Allen county, Indiana, and the mortgagor- expressly agree to pay the sum of money above secured without any relief from valuation or appraisement laws.

In witness whereof the mortgagors have hereto set their hands and seals this 23 day of Jan., A. D. 1875.

HENRY J. RUDISILL. [SEAL.]
ELIZABETH E. RUDISILL. [SEAL.]

STATE OF INDIANA, }
Allen County, } *ss:*

Before me, Warren H. Withers, a notary public in and for said county, this 23 day of January, 1875, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, acknowledged the execution of the annexed mortgage.

347 Witness my hand and seal this twenty-third day of January, A. D. 1875.

[NOTARIAL SEAL.] W. H. WITHERS,
Notary Public.

Recorded Jan. 26, 1875.

JOHN M. KOCH, *Rec. A. Co.*

STATE OF INDIANA, }
Allen County, } *ss:*

I, Joseph Mommer, Jr., recorder in and for said county, hereby certify that the above and foregoing mortgage is a full, true, and complete copy, as is found of record in mortgage record No. 26, page 564, of the records remaining in my office.

Witness my hand and official seal this 14 day of March, 1881.

[SEAL.] JOSEPH MOMMER, JR., *Rec. A. Co.*

And, afterwards, to wit, at the June term of said court, on the 17th day of June, A. D. 1881, before the Honorable Walter Q. Gresham, judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Watson Wall, Mary Wall, John A. Shoaff, and Susan B. Shoaff, and file their answer to the cross-complaint of Oscar A. Simons and John H. Bass in these words, to wit:

The joint answer of John A. Shoaff and Susan B. Shoaff, his wife, and Watson Wall and Mary Wall, his wife, to the cross-complaint of their codefendants, Oscar A. Simons, John H. Bass, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley.

348 These defendants to said cross-complaint, now and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said cross-complaint contained, for answer thereto, or unto so much as these defendants are advised is material for them to make answer unto, they answer and say—

That they admit that said Henry J. Rudisill and his wife, Elizabeth Rudisill, did, at the time named in said cross-complaint, execute to said Elizabeth Rudisill the mortgage on the premises therein described, and for the purposes in said cross-bill set forth, and that the same was duly recorded in the records of the recorder's office of

Allen county, as in said cross-complaint set forth, and that said mortgage contained the agreement and condition as alleged in said cross-bill; and they further admit the execution of said bonds and coupons, as in said cross-complaint set forth, by said John H. Barnett and Abraham G. Barnett, and that said John H. Barnett did execute the trust deed in the nature of a mortgage to secure said bonds, as in said cross-bill set forth; and they also admit that Henry J. Rudisill and Elizabeth Rudisill, his wife, executed to John H. Barnett, now deceased, the mortgage to secure the bond of said Henry J. Rudisill to said Barnett, as in said cross-complaint set forth, and that the land described in said last-named mort-
349 gage are part of those described in said first-named mort-
gage, as aforesaid. They also admit that said John H. Barnett died testate, and that his will was duly probated as aforesaid, and that in said will the said Abraham G. Barnett was named as executor, but they aver that he never accepted said appointment, but wholly failed to take out letters testamentary or to give bond or qualify as such executor; that said Abraham G. Barnett did do some acts, as these defendants are informed and believe, in collecting rents and paying some debts and funeral expenses, but during all the time said A. G. Barnett was assuming to so act these defendants supposed he had taken out letters testamentary and had duly qualified as such executor; that these defendants have no knowledge as to whether said A. G. Barnett acted in good faith or not in that behalf, but concede that he might have so acted, but they deny that they or either of them ever recognized him as the lawful executor of said estate or treated him as such; that said A. G. Barnett never took possession of the estate of said John H. Barnett nor attempted any regular administration thereof, nor was he ever recognized as such executor by all the debtors, creditors, heirs, and legatees of said estate.

And these respondents admit that the said Rudisill did sell to said Burgess, Kamm, and Zollinger part of the land so mortgaged to said John H. Barnett, deceased, and that the part so sold is correctly described in said cross-complaint; and they admit
350 that said A. G. Barnett executed the pretended release of said
mortgage so executed to said John H. Barnett as to the premises so conveyed to said Burgess, Zollinger and Kamm, but they say that they are informed, and believe such information true, that said A. G. Barnett had no right or authority to release the same whatever, but that said release is wholly void as to these defendants; and they say this honorable court, in and by the interlocutory decree already rendered in this cause, has adjudged and decreed that said release so executed by said A. G. Barnett was and is wholly void as to these respondents, and they now pray the protection of said interlocutory decree, and that they may not be compelled to litigate the question as to the void character of said pretended release again.

And these defendants, further answering, say that they have heard that said H. J. Rudisill and wife did execute to said A. G. Barnett a mortgage on what was then and is yet known as the mill property as a substituted security of said $10,000 bond executed to said John

H. Barnett, deceased; but they say as to all said transactions they never had any knowledge whatever until they were informed of the said facts by the plaintiff's bill of complaint, and from their counsel,
in the progress of this case, and that until this suit was insti-
351 tuted they did not, nor did either of them, know anything
whatever of such release or such substituted mortgage, and when so informed of the existance of such release and substituted mortgage they and each of them promptly repudiated the same and the right or authority of said A. G. Barnett to execute said release or accept any such substituted security; and they further say that whether the description of said premises set forth in said substituted mortgage are part of the lands conveyed by said mortgage to said Elizabeth Rudisill they know not, further than by information they believe they are; but they say that they further admit that said Elizabeth Rudisill did execute the release of her mortgage upon the said portion of the lands described as sold to said Burgess, Zollinger, and Kamm, which release was and is good and valid, and was made with the intention then and there on the part of said Elizabeth Rudisill to rely wholly upon the remaining portion of her said mortgaged premises as security for her said annuities, and always so intended until she sold said mortgage to said Simons and Bass.

And these defendants, further answering, say that they had no connection with or knowledge of the said release so executed by said Elizabeth Rudisill until this suit was instituted, — learned of the same
in connection with the preparation of their defense thereto, but
352 they aver that when the said John H. Barnett took his said
mortgage he had no knowledge whatever of the said mortgage so held by the said Elizabeth Rudisill, but believed he was getting a first mortgage on the premises described therein, and they aver that her said mortgage became a lien on the premises therein described, as follows: The south half of the northeast quarter, 57.76 acres; north half of the southeast quarter, 58.12 acres; southeast fraction, containing 20.22 acres, in section 35, township 31 north, of range 12 east, saving all that part of said premises lying south of a line running westerly from the mill thereon and west of the said St. Joseph's State road, as now travelled, supposed to contain about seven acres, and also saving therefrom that portion of said premises heretofore sold and conveyed to Henry C. Gray, Maria C. Freeman, and Julia A. French; that said Elizabeth has released said 57.76 acres of said premises, and various other portions thereof, without any consideration therefor, which said releases all remain and are void if a consideration is necessary to make the same valid. And these defendants aver that said Elizabeth had no intention whatever of holding her said mortgage lien on said released premises as against these defendants any more than as against said Burgess, Zollinger, and Kamm, but forever and absolutely released and abandoned all claim whatever to said released premises as to all
persons alike.

353 As to what said Zollinger, Burgess, and Kamm paid for
their said purchase these defendants have no personal knowledge, but they deny that said Henry Rudisill in good faith conveyed

the premises to said purchasers, supposing he transferred a title free and clear from all liens, but, on the contrary, he well knew that said A. G. Barnett had no power to execute said release, and fraudulently procured such release as a mere pretext to enable him to effect said sale; and said Burgess, Zollinger, and Kamm knew, or might easily have known, that said A. G. Barnett had no authority whatever to release the same from the said mortgage so given to said testate. And they further aver that if said Burgess, Zollinger, and Kamm had exercised any reasonable diligence whatever they could have easily discovered that said release by A. G. Barnett was wholly void.

And these defendants further admit that said Burgess, Zollinger, & Kamm did lay out part of the lands so purchased by them in an addition to the city of Fort Wayne, and that said parties' interest, as among themselves, was as stated, to wit: that said Zollinger has the undivided one-fourth, and has his interest set off to him as aforesaid, and that said Zollinger sold his said interest to said cross-complainants, Simons and Bass.

And these defendants admit the default in the payment of the interest accruing on said coupon bonds, and that said Bissell
354 brought suit thereon, and that said Bissell's bill contains the
covenants set forth, and also admit the decree rendered in this cause as stated, but as to what the consideration was upon which such mortgage was executed to A. G. Barnett these defendants have no knowledge and cannot answer, and they aver that neither they nor any of their rights whatever ought in equity to be affected or in any way prejudiced by the said transaction between the said A. G. Barnett and said Burgess, Zollinger, and Kamm, and Henry J. Rudisill; that Henry J. Rudisill was and is the real debtor of said Elizabeth Rudisill upon her said annuity mortgage, and that said Elizabeth Rudisill was entirely willing to look to the said premises then owned by said Henry J. Rudisill and so described in his mortgage to said A. G. Barnett for her said debt; that said premises were, in her judgment, worth at least $20,000, and ample security for her debt, and for that reason and no other she released said premises from her said mortgage, and never expected or intended to hold the premises so mortgaged to said testator therefor; that said Henry J. Rudisill continued to own and hold said mill and mill property upon which said Elizabeth so relied as her security long after the said release was executed by her of the property covered by said mortgage so executed to said J. H. Barnett, deceased.

355 And these defendants deny that there is any other matter or thing in said cross-complaint material for them to answer and not herein fully and sufficiently answered, confessed, traversed, or denied, all of which matters and things these defendants are ready and willing to ever, maintain, and prove to this honorable court as it may direct, and they pray to be hence dismissed with their reasonable costs and charges in this behalf expended.

JOHN A. SHOAFF.
SUSAN R. SHOAFF.

Subscribed and sworn to before me this 14th day of June, 1881.
[NOTARIAL SEAL.] ELIJAH BARTON,
Notary Public.

And the defendant, Abraham G. Barnett, files his answer to the cross-bill of said Simons and Bass in these words, to wit:

Answer of the defendant, Abraham G. Barnett, to the cross-complaint of Oscar A. Simons, John H. Bass, Andrew Hoffmiester, Mary J. McCurdy, and Alfred Hattersley.

And said Abraham G. Barnett, reserving unto himself all manner of exceptions to said cross-complaint on account of its imperfections, for answer thereto says that he has been informed since the commencement of this suit that said defendants, Henry J. Rudisill and Elizabeth Rudisill, his wife, did execute a mortgage upon the premises therein described and for the purposes therein stated
356 to the said Elizabeth Rudisill, and that the same was duly
recorded, as in the said cross-complaint set forth; and he also admits that he and said John H. Barnett, deceased, executed the bonds and coupons to the plaintiff, and that said John H. Barnett, deceased, also executed the trust deed on the premises therein described to secure said bonds and coupons, as in said cross-complaint set forth; and he also admits that said Henry J. Rudisill executed the bond for $10,000 to said John H. Barnett, and also that the said Henry J. Rudisill and wife executed the mortgage to secure the performance of the conditions in said bond, as set forth in said cross-complaint, but he says that as to whether said mortgage so executed by said Henry J. Rudisill and wife to said Elizabeth Rudisill is a prior lien upon the said premises described in said mortgage to said John H. Barnett, deceased, or, if it is, as to how much indebtedness said prior mortgage in equity secures, this defendant has no knowledge and cannot, therefore, answer.

This defendant, further answering, says that he admits that said John H. Barnett is deceased, and that he died testate, and in his will he named this respondent his executor, and, believing that being so named as executor constituted him such in law, this respondent did proceed to collect some rents arising out of the real estate left by said John H. Barnett, and paid some debts and expenses incurred in executing some directions in said will, but he
357 says that there was no recognition of his said acts as valid
and lawful acts by any one interested in said estate, who at the time knew this respondent was not duly appointed by the proper court and under the authority of such appointment and a proper bond and oath of office.

And this respondent further admits that said Henry J. Rudisill did sell part of the premises so mortgaged to said John H. Barnett, deceased, to said Burgess, Zollinger, and Kamm, and that the part so sold is correctly described in the said cross-complaint.

And this respondent, further answering, shows to the court that, believing he was authorized to act as the executor of said John H. Barnett without letters testamentary or bond or oath, he admits he

was induced to enter upon the margin of the record where said mortgage so executed to said John H. Barnett was recorded a release of the same as to part of the said mortgaged premises; that said release was fraudulently obtained by the said Henry J. Rudisill, by then and there representing to this respondent that he would give him in lieu of said mortgage so executed to said John H. Barnett a good and valid mortgage on said mill property discribed in said cross-complaint, and that the same was free and clear from all incumbrances, and would be ample security for said bond so executed by said Rudisill to said John H. Barnett; and, believing said
statements of said Rudisill, and believing that a mortgage
358 so executed to him on said mill property would be a first lien
thereon, and knowing said mill property was then and there worth, or estimated to be worth, at least $20,000, he was induced by said representations to execute said release set forth in said cross-complaint; that he never knew of the existance of said mortgage to said Elizabeth Rudisill until after the commencement of this suit, and if he had known of such prior mortgage he never would have so released said mortgage so executed to said testator or taken said mortgage upon said mill property in lieu thereof, and he says that said Burgess, Zollinger, and Kamm had the same opportunity to know of the existance of said mortgage to said Elizabeth Rudisill that this defendant had, and knew, or had reason to know, that this defendant executed said release upon the belief that he was getting a first lien upon said mill property in lieu thereof. And this respondent further says that he admits said Elizabeth Rudisill released her said mortgage lien upon the premises so conveyed to said Burgess, Zollinger, and Kamm, but he says the same was executed by her without fraud and for the purpose of absolutely discharging the same from her said mortgage lien, and did so execute said release to accommodate said Henry J. Rudisill, and not for the benefit, in any
manner whatever, of said Burgess, Zollinger, and Kamm. As
359 to what amount of money said Burgess, Zollinger, and Kamm
paid to said Henry J. Rudisill this respondent does not know except from hearsay, and cannot state.

And this respondent, further answering, says that he has heard that part of said premises so purchased by said Burgess, Zollinger, and Kamm has been laid out into town lots, streets, and alleys, as stated in said cross-complaint, and partitioned among themselves, as therein stated, and that said Zollinger may have sold and conveyed his portion thereof to the complainants, Simons and Bass; and he further admits that default was made in the payment of interest accrued on said coupon bonds, and that said Bissell brought this suit and filed his bill containing all the averments set forth in said cross-complaint, and that all matters arising upon said bill, answers, cross-bills then on file, and on the testimony then before the court, the court made and caused to be entered its interlocutory decree in the premises, which, he is advised, justly disposed of all the said questions then before the court, and he prays the protection of said decree.

And this defendant, further answering, shows to the court he has no knowledge as to whether said Elizabeth Rudisill has sold her said mortgage to the cross-complainants, Bass and Simons, but has heard that such sale was made, and he believes said Bass and Simons has filed a cross-bill to foreclose the same.

360 And this defendant, further answering, shows to the court that by the decree of this court rendered as above stated it was decreed that said partial release so executed by this defendant, although void as to said defendants, Watson Wall and Mary Wall and John A. Shoaff and Susan B. Shoaff, and said minor defendants, Byron Hueston Barnett and James William Barnett, and the complainant, George P. Bissell, yet that said partial release was good as to this defendant, and thereby also settled the validity of the said mortgage so executed to him, and he says that he has and holds under said will a contingent remainder in said premises so mortgaged to said Bissell by said John H. Barnett, and he has a right in equity to have the property so mortgaged to this respondent, commonly known as the mill property, sold first to satisfy the five-eight-s of all that may be found due to said Bissell upon said bonds and coupons by the decree of this court, and he therefore says that said cross-complainants have no right in equity to have or to control for their benefit in any manner whatever, or to insist that said Burgess, Zollinger, and Kamm, or their heirs or assignees, shall have or control in any manner whatever, said mortgage so executed to this respondent, or to interfere in any manner whatever with his rights to
the same and his right to have the complainant, George P.
361 Bissell, to be decreed to sell said mill property to make five-
eight-s of his said mortgage debt. And he says that the purchase-money paid said Rudisill by said Burgess, Zollinger, and Kamm did not constitute any part of the consideration for which said mortgage was executed to this defendant, but the entire consideration therefor was this defendant's release of said mortgage to said John H. Barnett, and said Burgess, Zollinger and Kamm, and their heirs and assigns, have no right of subrogation or otherwise in or to said mortgage so executed to this defendent.

And this defendant, having answered said cross-complaint, or so much thereof as he is informed it is necessary for him to make answer unto, *he* prays to be dismissed with his reasonable costs and expenses in this behalf laid out and expended.

A. G. BARNETT.

Subscribed and sworn to before me this 14th day of June, 1881.
[NOTARIAL SEAL.] ELIJAH BARTON,
Notary Public.

And said Oscar A. Simons and John H. Bass now file their replication to the answers of said Walls, Shoaffs, Barnett, and George P. Bissell to their cross-complaint in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.

362 GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The replication of Oscar A. Simons, John H. Bass, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley to the answers of Abraham G. Barnett, Watson Wall, Mary Wall, John A. Shoaff, and Susan B. Shoaff to the cross-bill of said repliants.

The said repliants, saving and reserving to themselves all exceptions to the insufficiencies of said answers and each of them, for replication thereunto and to each of them, saith that they will aver and prove their said cross-bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of said defendants and each of them are uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answers and each of them contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said cross-bill they have already prayed.

OSCAR A. SIMONS.
ANDREW HOFFMEISTER.
JOHN H. BASS.
MARY J. McCURDY.
ALFRED HATTERSLEY.

R. S. TAYLOR, *Solicitor.*

The foregoing proceedings were had on the 27th day of January, 1881, but were inadvertently omitted to be entered then, and 363 accordingly are entered now for then.

And the said Oscar A. Simons and John H. Bass now file their answer to the cross-bill of Abraham G. Barnett in these words, to wit:

In the Circuit Court of the United States for the District of Indiana. In Chancery.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The answer of Oscar A. Simons, John H. Bass, George Esmond, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley to the cross-bill of the defendant, Abraham G. Barnett.

The said defendants, reserving to themselves all exceptions to the said cross-bill for its many and manifest defects, nevertheless for answer thereto say that they admit the filing of the original bill in this cause as alleged, and the contents thereof as stated, and the execution of a bond and mortgage by Henry J. Rudisill to John H. Barnett as alleged, and that said John H. Barnett died testate as alleged, and by his last will made the devises of real estate al-

leged, and that his said will was probated as alleged, and that said Abraham G. Barnett was named in said will as executor, and assumed to and did act as such executor without oath, bond, or letters, and that as such executor said Abraham G. Barnett released upon the record the said mortgage from Henry J. Rudisill to John H. Barnett, and in consideration thereof received from said Rudisill
and his wife a mortgage on the mill property describrd in
364 said cross-bill, and that the copy of the same filed with said
cross-bill is a correct copy, and that it is claimed by said Oscar A. Simons and John H. Bass (and is true, as all these defendants aver) that said Henry J. Rudisill and his wife long before the execution of said mortgage to Abraham G. Barnett executed to Elizabeth Rudisill a mortgage embracing, with other lands, all of said mill property as described in said mortgage to Abraham G. Barnett, except a small portion thereof situate on the east side of the St. Joe river and in section thirty-six, to secure to the said Elizabeth Rudisill an annuity of eight hundred dollars per annum during her natural life, of which mortgage a copy is on file in this cause with the cross-bill of the defendants, Simons and Bass, seeking foreclosure thereof, marked "A," to which copy reference is hereby made, which mortgage was duly recorded in the office of the recorder of said county on the 7th day of January, 1861.

And the said defendants, further answering, say that said mortgage, together with all unpaid installments of annuity due thereon, was assigned by said Elizabeth Rudisill to the defendants, Oscar A. Simons and John H. Bass, on the 29th day of October, 1879, and that all the installments of the annuity stipulated and provided by said mortgage and the obligation therein contained which have accrued and become payable since the — day of ——, and including that date, and interest thereon, remain and are now due and unpaid.

365 And said defendants, answering further, say that they admit that after the execution of all said mortgages said Henry J. Rudisill conveyed one undivided half of said mill property to John E. Hill, Jr., and the other undivided half to Eliza Rudisill, and that said John E. Hill, Jr., and Eliza Rudisill afterwards conveyed the same to the defendant, George Esmond, and that the consideration of said conveyances to George Esmond was paid by the defendants, Simons and Bass, and that the said George Esmond now holds the legal title to said mill property under said conveyances to their use.

And said defendants, answering further, say that one undivided half of said mill property was conveyed by Eliza C. Rudisill, grantee of said John E. Hill, Jr., to said George Esmond on the 7th day of January, 1880, and the other undivided half thereof by the said Eliza Rudisill, the grantee of Henry J. Rudisill, on the 5th day of November, 1879; that during a large part, to wit, one-half of the time since said conveyances were made said mill has been entirely out of repair, so that it was impossible to run or use the same at all; that said mill and its fixtures and machinery are in a ruinous state of dilapidation and wear at best; that in the present undetermined

situation of the title thereto neither said Esmond or said Simons and Bass have been willing to, or could afford to, invest money in substantial repairs, except such as have been made under the
366 order of this court upon the dam, race, forebay, and foundation to prevent said mill from being entirely destroyed by floods; that in the condition in which said mill property has been ever since said conveyances to said Esmond it was not worth and could not have been leased so as to produce any rental in excess of necessary current insurance, petty repairs and taxes, and that neither said Esmond or said Simons and Bass have received any net income or profits therefrom whatever, but all income which has been received has been applied in payment of insurance, taxes, and for necessary care and preservation of the property.

And said defendants, answering further, say that they admit that a part of the lands described in said mortgage executed by said Henry J. Rudisill to said Abraham G. Barnett and constituting the St. Joe mills property are located in section thirty-six of town thirty-one (31), range twelve (12), and are not embraced in said mortgage executed by Henry J. Rudisill to Elizabeth Rudisill, and that the description of such part contained in the said cross-bill is correct.

And said defendants, answering further, say that they deny that there was any understanding between said George P. Bissell & Co. and Henry J. Rudisill at the time of the execution of said coupon bonds by said Barnetts that any part of said money should be loaned to or repaid by said Rudisill; on the contrary, they affirm, upon information which they believe to be true, that of the money so loaned by said George P. Bissell & Co. to said Barnetts
367 five thousand dollars was by them loaned to one Newton B. Freeman, and that it was as an indemnity to said Barnetts and as surety for said Freeman and not otherwise; that said Rudisill executed said bond and mortgage to said J. H. Barnett, and that said Rudisill was not the principal debtor to said George P. Bissell & Co. for said sum.

And said defendants, answering further, say that as to the nonpayment of interest upon said coupon bonds they are ignorant and have no knowledge.

And said defendants, answering further, — that as to the averments of fraud and misrepresentation by said Henry J. Rudisill to said Abraham G. Barnett to induce the execution of said release and the substitution of said mortgage on said mill property in the place of said mortgage to said John H. Barnett they are also ignorant and have no knowledge, wherefore they deny all said charges of fraud on the part of said Rudisill, and ask that strict proof be required thereof.

And said defendants, further answering, say that they deny all fraud or concealment in act or intent by the defendants, Esmond, Simons, or Bass, in the said conveyances to George Esmond of said mill property.

And said defendants, answering further, say that the said cross-complainant, Abraham G. Barnett, before the commencement of this

suit delivered the said bond and mortgage executed by said
368 Henry J. Rudisill to said John H. Barnett to the attorneys
of the complainant Bissell to be foreclosed; that he has himself as a party in this cause by his pleadings and by his attorneys insisted and claimed that the release entered by him of said mortgage was without authority and void, and that said mortgage should be foreclosed to make five-eighths of the sum due on said coupon bonds, and that this court, in accordance with the said claim of said Abraham G. Barnett and his codefendants, the legatees of John H. Barnett, and the complainant Bissell, has decreed that said release was void, and that said mortgage to John H. Barnett should be foreclosed for the payment of five-eighths of the sum due the complainant upon said coupon bonds.

And said defendants, answering further, say that said mortgage in said cross-complaint mentioned, executed by said Henry J. Rudisill to said Abraham G. Barnett upon said mill property, was executed in consideration of said release and as a substituted security in the place of said mortgage to John H. Barnett so released.

Wherefore said defendants say that said cross-complainant, having elected to avail himself of said mortgage to John H. Barnett and enforce the same, is estopped to claim any benefit from the said mortgage given to him in lieu thereof.

And said defendants, further answering, say that after the
369 execution of the release of said mortgage from Henry J. Rudisill to John H. Barnett entered upon the record by said Abraham G. Barnett as aforesaid, and upon the faith thereof Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm purchased from said Rudisill the lands described in said release and paid therefor in cash ten thousand dollars, being the full value of the lands so purchased; that these defendants, Simons, Bass, Hoff-eister, McCurdy, and Hattersley are the grantees in good faith and for full value paid and owners of the interest of said Zollinger in said purchase, and have filed in this cause a cross-complaint asking to be subrogated with the other purchasers of said property to the place of said Abraham G. Barnett in said mortgage upon the mill property aforesaid, to which substitution the said defendants say they have a higher equity than any claim therein in favor of said cross-complainant.

And said defendants, answering further, say that for the said conveyances of the legal title in said mill property to said Esmond as aforesaid a consideration was paid in cash and otherwise, and that neither the said Esmond or said Simons and Bass ought to account for any rents and profits received from said mill or apply the same upon said annuity mortgage or elsewhere.

And said defendants, further answering, say that as to all the
averments of said cross-complainant not herein specifically
370 referred to they deny the same: wherefore they pray to be
discharged with their costs, &c.

OSCAR A. SIMONS.
JOHN H. BASS.
GEO. ESMOND.

STATE OF INDIANA, *Allen County:*

John H. Bass, Oscar A. Simons, and George Esmond, being each duly sworn, on their oaths depose and say that they have read the foregoing answer; that the facts therein stated as of their own knowledge are true, and that the facts therein stated upon information from others are true to the best of their knowledge, information, and belief.

OSCAR A. SIMONS.
J. H. BASS.
GEO. ESMOND.

Subscribed and sworn to before me this 14th day of June, 1881.
NOBLE C. BUTLER, *Clerk.*

And the said Henry Burgess, Hannah Kamm, Andrew J. Kamm, and George L. Kamm now file their answer to said cross-bill of said Abraham G. Barnett in these words, to wit:

In the Circuit Court of the United States for the District of Indiana. In Chancery.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The joint and several answer of Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, three of the defendants, to the cross-bill of complaint of Abraham G. Barnett.

371 These defendants, reserving to themselves all right of exception to the said cross-bill of complaint, and especially objecting to the same for that: 1st, said Abraham G. Barnett in his individual capacity is not a proper party complainant for the foreclosure of said mortgage executed by Henry J. Rudisill and wife to him as representative of and for the benefit of the estate of his deceased brother, John H. Barnett, dated on the 23rd day of January, 1875, and conveying the St. Joe mill property in Allen county, Indiana; 2nd, this court has not jurisdiction to hear and determine the matters therein alleged against these defendants, and, 3rd, said cross-bill is not within the purview of the agreement upon which the interlocutory hearing of February 10th, 1881, was had, and for answer to so much of said cross-bill as these defendants are advised is material or necessary for them to answer they admit that George P. Bissell filed a bill of complaint as alleged and setting forth the matters and things alleged; that Henry J. Rudisill executed a $10,000 bond to John H. Barnett, and two mortgages, one to John H. Barnett and the other to Abraham G. Barnett, in a representative capacity, of which the description in said cross-bill is substantially correct; that John H. Barnett died testate in January, 1872, and that his will, a copy of which is filed in this cause, was duly probated; that the defendants Kamm are the heirs of J. J. Kamm, who died intestate, and that Oscar A. Simons and John H. Bass claim, as alleged, a first lien on all said property in both said mortgages described.

372 Further answering these defendants say they are ignorant of the facts and transactions alleged as to the transfer of the equity of redemption in said St. Joe mill property and the use and employment thereof; and, on information which they believe to be true, these defendants deny that at or before the time the $8,000 loan from George P. Bissell to the brothers Barnett was consum-ated it was agreed between said brothers Barnett, George P. Bissell, and Henry J. Rudisill that $5,000 thereof should be paid by said Rudisill to said Bissell; that said Rudisill received $5,000 or any part of said $8,000; that said John H. Barnett was only the surety of said Rudisill for the payment of $5,000 of said $8,000 loan; that said Rudisill was the principal debtor to said Bissell for $5,000 of said loan; that the premises described in the mortgage dated December 13th, 1871, executed by said Rudisill to said Barnett, are the principal security for said sum; that Charles A. Zollinger, Henry Burgess, and J. J. Kamm requested cross-complainant to release said mortgage; that said Rudisill made to said Barnett any false or fraudulent misrepresentations to procure said release to said A. G. Barnett as to the St. Joe mill property being unincumbered at that time. On the contrary, further answering, these defendants aver, on information which they believe true and reliable, that said Rudisill had actually informed said A. G. Barnett of the ex-
373 istance of an annuity mortgage to his mother, then of record,
encumbering said St. Joe mill property; that said Rudisill executed said $10,000 bond several weeks subsequent to the consum-ation of said $8,000 loan upon the faith of a promise to him made by said John H. Barnett to convey to him a one-sixth interest in the paper mill and business at Fort Wayne owned for the most part by said brothers Barnett and carried on in the name of Freeman & Barnett; that said J. H. Barnett never fulfilled such agreement and that said bond was delivered, if at all, without the consent of said Rudisill, and that the only consideration said Rudisill ever received for said bond is said unfulfilled promise; that said brothers Barnett used a portion of said $8,000 loan for their private account and put the balance in said paper mill and business, of which said Rudisill never received a part and from which he never received any benefit; that said mortgage dated December 13th, 1871, was executed to J. H. Barnett by H. J. Rudisill and wife on the understanding that said J. H. Barnett should convey to one N. B. Freeman a portion of his — in said paper mill and business a one sixth interest therein, and that said Freeman should assume and pay to said J. H. Barnett the sum originally agreed to be paid by Rudisill for such conveyance to him, but that said transfer and said assumption never was made; that said mortgage on the St. Joe mill property was given by said Rudisill to said A. G. Barnett as representa-
374 tive of his said brother's estate, solely in consideration of a
release of that portion of the premises covered by the mortgage of December 13th, 1871, conveyed to said Burgess, Zollinger, and Kamm from the lien thereof, and on the faith of the representation to said Rudisill at the time, made by said A. G. Barnett, that his deceased brother had expressly conferred on him the power to

release the same, and the apparently ample authority conferred by said J. H. Barnett on said A. G. Barnett by his last will, to a copy of which, filed with this answer, reference is hereby made, and the advice of the attorney of said A. G. Barnett that he, A. G. Barnett, had ample authority for that purpose; that neither said Burgess, Zollinger, nor Kamm knew personally of said mortgage so released, and that they paid $10,000 for said lands so released, in good faith, in the belief that all mortgage and other liens thereon were paid or satisfied before the consum-ation of said purchase.

Further answering these defendants aver, on information which they believe true, that Abraham G. Barnett, the cross-complainant, filed in answer to the bill of complaint of said George P. Bissell a plea of discharge in bankruptcy, and that said complainant and the beneficiaries of said J. H. Barnett's estate are attempting in this suit, as appears from the pleadings already filed, to enforce the col-
lection of all that is claimed to be due from said Rudisill to
375 the complainant and said beneficiaries by a foreclosure of
said mortgage dated December 13th, 1871, and the sale of said premises purchased in good faith as aforesaid by said Burgess, Zollinger, and Kamm; that said beneficiaries of J. H. Barnett's estate, including said Abraham G. Barnett, met and discussed the provisions of said testator's will directly after his death, and concluded and believed and agreed among themselves that said will of itself gave the cross-complainant absolute power over the personalty left by said testator and the power to settle the estate, and that cross-complainant thereupon assumed said trust and the control and disposed of all personalty of the estate, and with the knowledge of the remaining beneficiaries continued to exercise the same until after the commencement of this suit without objection from any one of said beneficiaries.

And these defendants further deny all knowledge of, or complicity in, any misrepresentations or fraudulent representations in said cross-bill alleged, without this, that there is any other matter, cause, or thing in the said cross-complainant's said cross-bill of complaint contained, mentioned, or necessary for these defendants to make answer to, and not herein and hereby well and sufficiently an-
swered, confessed, traversed, and avoided or denied, is true to
376 the knowledge or belief of these defendants, all which mat-
ters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed as to said cross-bill, with their reasonable costs and charges in this behalf most wrongfully sustained.

HENRY BURGESS.
HANNAH KAMM.
GEORGE L. KAMM.

Attest: SAMUEL R. ALDEN,
Solicitor for Defendants, Burgess & the Kamms.

STATE OF INDIANA, } *ss:*
Allen County, }

Before me, this 17th day of June, 1881, personally appeared Henry Burgess, Hannah C. Kamm, and George L. Kamm and subscribed the above and foregoing answer, and, having been by me first duly sworn, stated under oath that they have read the foregoing answer and know its contents, and that the same is true of their own knowledge, except as to matters therein stated on information and belief, and as to those matters they believe them to be true.

NOBLE C. BUTLER, *Clerk.*

And said Anna, Henry, and Charles Kamm, by Samuel R. Alden, their guardian *ad litem*, now file their answer to the cross-bill of said Abraham G. Barnett in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL, Trustee,
vs.
377 ABRAHAM G. BARNETT, *et al.*

Answer of Anna Kamm, Nellie Kamm, Henry Kamm, and Charles Kamm, infants under the age of twenty-one years, by Samuel R. Alden, their guardian *ad litem*, to the cross-bill of Abraham G. Barnett.

Said defendants, by their said guardian, in answer to said cross-bill, say they are infants under the age of twenty-one years; that said Charles is of the age of 17 years, Henry 14 years, Anna 10 years, and Nellie 7 years, and they submit their rights and interests in the matter in question in this cause to the care and protection of this honorable court.

S. R. ALDEN,
Guardian ad Litem.

And the said Abraham G. Barnett now files his replication to all the answers aforesaid to his cross-bill in these words, to wit:

The replication of Abraham G. Barnett, cross-complainant, to the joint answer of Oscar A. Simons, John H. Bass, George Esmond, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley, and also to the joint answer of Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, and George L. Kamm, defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies 378 of the said answers, for replication thereunto saith that he will aver and prove his said cross-bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill [he] hath already prayed.

L. M. NINDE,
Solicitor for A. G. Barnett.

379 And said Oscar A. Simons, John H. Bass, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley now, by leave of court, file their joint cross-bill in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The cross-complaint of Oscar A. Simons, John H. Bass, Andrew Hoffmeister, Mary J. McCurdy, and Alfred Hattersley, five of the defendants in said cause, against the plaintiff, George P. Bissell, and their codefendants, Abraham G. Barnett, Byron Huston Barnett, James William Barnett, Mary Ann Wall, Susah B. Shoaff, Henry J. Rudisill, and Elizabeth E. Rudisill.

The said cross-complainants, complaining of the complainant, George P. Bissell, and their codefendants aforesaid, show to this honorable court that on the 30th day of October, 1860, Henry J. Rudisill and Elizabeth E. Rudisill, his wife, executed to Elizabeth Rudisill a mortgage in and by which he conveyed to her the following-described lands: "The south half of the northeast quarter, containing fifty-seven and $\frac{36}{100}$ acres, the north half of the southeast quarter, containing fifty-eight and $\frac{1}{100}$ acres, and the southeast fraction, containing twenty and $\frac{22}{100}$ acres, all in section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, saving and
380 excepting therefrom all that part of said premises lying south of a lane running westerly from the mill thereon, and west of the St. Joseph State road as now travelled, supposed to contain about seven (7) acres, and also saving and excepting therefrom that portion of said premises heretofore sold and conveyed to Henry C. Gray, Maria C. French, and Julia A. Freeman, which mortgage contained an agreement and condition to the following effect, to wit, that the said Henry Rudisill should, from and after the date of said mortgage, pay to said Elizabeth Rudisill, during the full period of her natural life, an annuity of eight hundred dollars, payable in quarterly installments of two hundred dollars each on the first days of January, April, July, and October of each year until her death, and that upon full payment being made of said annuity, according to the terms of said agreement, said conveyance should be void, which mortgage was duly recorded in the office of the recorder of Allen county, in which said lands were situate, on the 7th day of January, 1861, of which mortgage a copy is filed herewith, marked "Exhibit A," which said cross-complainants pray may be taken as part of this cross-complaint.

And said cross-complainants aver that said mortgage was given for purchase-money and in consideration of the conveyance of the lands described therein by said Elizabeth Rudisill to said Henry J. Rudisill.

381 And said cross-complainants, complaining further, show to the court that on the 15th day of July, 1869, John H. Barnett and Abraham G. Barnett executed to George P. Bissell & Co. ten coupon bonds for the sum of one thousand dollars each, all of like tenor and date, payable ten years after date, with interest at nine per cent. per annum, represented by the coupons thereto attached, of one of which bonds, with its unpaid coupons attached, a copy is filed with the plaintiff's amended bill in this cause, and all which original bonds are now on the files of this court as part of the evidence offered on the preliminary hearing hereinafter more particularly referred [to], to which copy and original bonds said cross-complainants pray leave to refer; that to secure the payment of said bonds said John H. Barnett on the same day executed to George P. Bissell, the plaintiff in this cause, a deed of trust in the nature of a mortgage, conveying to him in trust for the holder or holders of said bonds, and to secure the payment thereof, the following-described lands, to wit: All of lot one hundred and five (105) on the original plat of the town of Fort Wayne, except a strip off the east side of said lot ten feet in width, running from front to rear thereof, and a part of lot one hundred and six (106) on the same plat, commencing at a point on the east line of said lot thirty (30) feet south of the northeast corner thereof; thence running south along said line
382 twenty (20) feet; thence west at right angles therewith to the west line of said lot; thence north along said west line twenty (20) feet; thence east at right angles therewith to the place of beginning, of which deed of trust a copy is filed with the plaintiff's amended bill in this cause, and which original deed of trust is on the files of this court as part of the evidence offered on the preliminary hearing of this cause, to which copy and original said cross-complainants pray leave to refer; that afterwards, to wit, on the — of ——, said Henry J. Rudisill executed to said John H. Barnett a bond in the penal sum of ten thousand dollars, with conditions thereto annexed, reciting that he had received from said John H. Barnett five thousand dollars of the money advanced by said George P. Bissell & Co. on and for said bonds, and assumed the payment of said sum and the interest thereon, and providing that upon such payment said bond should be void, of which bond a copy is filed with the plaintiff's amended bill of complaint in this cause, and which original bond is on file in this court as part of the evidence offered on the preliminary hearing; that afterwards, to wit, on the 13th day of December, 1871, said Henry J. Rudisill, with Elizabeth E. Rudisill, his wife, executed to said John H. Barnett a mortgage to secure the performance of said bond conveying to said John H. Barnett the following-described
383 lands: All that portion of the fractional southeast quarter of section thirty-five (35), township thirty-one (31), range twelve (12) east, bounded on the east by the St. Joseph river, south by the Bloomingdale road, west by the feeder to the Wabash & Erie canal, and on the north by the lands of Julia A. Freeman,

estimated to contain thirteen (13) acres, of which mortgage a copy is on file with the complainant's amended bill in this cause, and which original mortgage is now on the files of this court as part of the evidence offered on the preliminary hearing, to which copy and original the said cross-complainants pray leave to refer.

And said cross-complainants show to the court that the lands described in the mortgage last mentioned are part of the same lands described in the mortgage hereinbefore mentioned, executed by Henry J. Rudisill and wife to Elizabeth Rudisill, and were subject to said mortgage as a prior lien.

And said cross-complainants show further that on the — day of February, 1872, said John H. Barnett died testate; that by his last will, which was duly proved, he appointed said Abraham G. Barnett his executor and vested in him extensive and extraordinary powers in trust, and directed that he should act without giving bond or taking out letters testamentary, of which will a copy is filed 384 with the complainant's amended bill in this cause, to which copy these cross-complainants pray leave to refer; that said Abraham G. Barnett, supposing in good faith that he was lawfully authorized to exercise the powers conferred upon him by said will without oath, bond, or letters testamentary, proceeded without such bond, oath, or letters to take possession of the estate of said John H. Barnett and settle the same and execute the trusts vested in in him by said will, and was recognized and treated as the lawful custodian and representative of the estate of said John H. Barnett by all the debtors, creditors, heirs, and legatees thereof.

And said cross-complainants show further that on the 23rd day of January, 1875, said Henry J. Rudisill sold to Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm part of the lands described in the mortgage theretofore executed by him to John H. Barnett as aforesaid, the lands so sold being described as follows, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot number eight (8) of Wells' pre-emption, all in township thirty-one (31) north, of range twelve (12) east, more clearly described as follows: Commencing twenty-one feet east of the southwest corner of lot number one in Eckart's addition to the city of Fort Wayne in said section thirty-five; thence west along the south line of said addition to the water line of the feeder to the Wabash & Erie canal; thence southwesterly along 385 said feeder to its intersection with the right of way of the Fort Wayne, Jackson & Saginaw railroad; thence southeasterly along the said right of way to the centre of the Bloomingdale road; thence northeasterly with the center of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot eleven in Rudisill's subdivision of part of lot eight of Wells' pre-emption; thence northerly at right angles to said street three hundred and forty-three feet; thence easterly parallel with said Elizabeth street three hundred and eighty-seven feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning; that for the purpose of discharging the lands so sold by said Rudisill from incumbrances, and enabling him to convey a clear title thereto to said Burgess, Zollinger, and Kamm, said Abraham G. Barnett executed upon the margin of the record of said mortgage by said Rudisill to said John H. Barnett a release in the following words, to wit:

"I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that part of S. E. ¼ of sec. 35, t'p 31 east, this day conveyed by Henry
386 J. Rudisill to H. Burgess, Chas. A. Zollinger, & J. J. Kamm.

"Witness my hand and seal as such executor, Jan'y 23, 1875.

"ABRAHAM G. BARNETT, [SEAL.]
"*Executor of the Estate of John H. Barnett, Deceased.*

"Attest: JNO. M. KOCH, *Rec. A. C.*"

In consideration of which release and as a substituted security in the place of the mortgage so released the said Henry J. Rudisill, with his wife, Elizabeth E. Rudisill, on the same day executed to said Abraham G. Barnett a mortgage conveying to him as security for the performance of the conditions of the same bond hereinbefore mentioned the following-described lands, to wit: Commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-emption; thence north with the center of the St. Joe road northerly to a point where the St. Joe turnpike intersects the same; thence easterly along the center of said turnpike to the west quarter-post of section thirty-six in said township and range; thence southeasterly with the eastern boundary of said mill site to the bank of the St. Joe river; thence westerly with said river to the place of beginning, containing fifteen acres, more or less, and being the tract of land in section thirty-five, township thirty-one, range twelve, known as the St. Joe Mills property, of which mortgage a copy is on file with the complainant's amended bill in this cause,
and which original mortgage is now on the files of this
387 court as part of the evidence heretofore offered, and to which
said cross-complainants pray leave to refer, which lands are also part of the lands embraced in the mortgage herein first mentioned, which was executed by said Henry J. Rudisill and wife to said Elizabeth Rudisill and were subject to the prior lien thereof.

And said cross-complainants show further that on the same — last stated, to wit, on the 23rd day of January, 1875, the said Elizabeth Rudisill executed upon the margin of the record of the mortgage executed to her by the said Henry J. Rudisill, as hereinbefore stated, a writing purporting to be a partial release of said mortgage, in the words and figures following, to wit:

"I hereby release any and all liens by reason of this mortgage of the premises therein described, the following, viz: That part of the S. E. ¼ fr. quarter of sec. 35, t'p 31, R. 12 E., conveyed by Henry J. Rudisill to Messrs. Henry Burgess, Chas. A. Zollinger, Jno. J. Kamm, by deed dated July 23, 1875. Witness my hand and seal this 23 day of Jan., 1875.

"ELIZABETH RUDISILL."

The fact being that no deed was executed by Henry J. Rudisill to Henry Burgess, Charles A. Zollinger, and Jno. J. Kamm dated July 23, 1875, and that said writing was not attested by the recorder, for which causes said cross-complainants say that said writing was
388 void as a release, which writing was executed by said Elizabeth Rudisill as aforesaid at the request of said Henry J. Rudisill gratuitously and without any consideration whatever, and for the sole benefit of said Burgess, Zollinger, and Kamm as purchasers, supposing it to be a valid release of the lands sold to them from the lien of said mortgage, and to enable said Henry J. Rudisill to convey to them a clear title to the lands embraced in said release.

Said cross-complainants show to the court further that said Burgess, Zollinger, and Kamm paid to said Henry J. Rudisill ten thousand dollars cash for the lands sold and conveyed to them by him as aforesaid, which was the full value of the same; that it was the intention, *bona fide*, of said Henry J. Rudisill, in procuring said release, to be executed by said Abraham G. Barnett and Elizabeth Rudisill as aforesaid, to divest the lands conveyed to said Burgess, Zollinger, and Kamm of incumbrances, and convey to them a clear title thereto; that he believed that the release executed by said Abraham G. Barnett was valid and effectual to discharge the lands embraced in it from the lien of the said mortgage to John H. Barnett, and upon the faith of that belief requested and procured said Elizabeth Rudisill to execute the aforesaid supposed release of said lands from the lien of her mortgage, which he would not have done if
389 he had supposed said release executed by said Abraham G. Barnett to be invalid; that said Elizabeth Rudisill was ignorant of the exist*a*nce of said mortgage to John H. Barnett, and supposed when she executed the said supposed partial release of her mortgage that such release would discharge the lands conveyed to Burgess, Zollinger, and Kamm from all mortgage liens and enable them to take an unincumbered title by the conveyance of said lands to them by said Henry J. Rudisill, and that said Burgess, Zollinger, and Kamm received said conveyance and paid their money in good faith, believing that both the releases aforesaid were in all respects valid and effectual, and that the title conveyed by the deed of said Henry J. Rudisill was clear and unincumbered.

And said cross-complainants show further that afterwards, to wit, on the — day of ——, said Burgess, Zollinger, and Kamm laid the greater portion of the lands so conveyed to them by said Rudisill into lots, streets, and alleys as an addition to the city of Fort Wayne, of which addition a plat is on file with the complainant's amended bill in this cause, to which said cross-complainants pray leave to refer; that in the purchase of said lands the interest of said Zollinger in the same was one undivided fourth; that afterwards a partition was made between said Burgess, Zollinger, and Kamm by
390 which there was set off to said Zollinger as his full share of said lands the following, to wit:

That afterwards said Zollinger sold and conveyed the lands and lots so set off to him, as follows: To Andrew C. Hoffmeister, lot number — in said addition; to Mary J. McCurdy, lot number — in said addition; to Alfred Hattersley, lot number — in said addition, and to said Oscar A. Simons and John H. Bass all the residue of his lots in said addition and all his interest in the lands so purchased from said Rudisill, by means of which conveyances these cross-complainants have become and are the owners of all the interest in said lands that was conveyed to said Zollinger, the defendants, Henry Burgess, and the heirs of Jacob J. Kamm, all [of] whom are parties to this cause, being the owners of the remainder of said lands.

And said cross-complainants show further that on the 14th day of January, 1869, Elizabeth Rudisill released from the lien of said mortgage executed to her by Henry J. Rudisill as aforesaid all the lands described therein lying west of the St. Joseph feeder to the Wabash & Erie canal, and that all the remaining lands described in said mortgage were covered and included in and by the two mortgages subsequently executed by said Henry J. Rudisill
391 to John H. Barnett and Abraham G. Barnett, as aforesaid.

And said cross-complainants show, further, that afterwards default was made in the payment of interest due on said coupon bonds executed to said George P. Bissell by said John H. and Abraham G. Barnett; that on the — day of February, 1879, said George P. Bissell filed his bill in this court, setting out the execution of said coupon bonds and deed of trust, the default in the payment of interest on said bonds, the execution of said bond by said Henry J. Rudisill to said John H. Barnett and the mortgage aforesaid to secure the same, the death of said John H. Barnett, the execution of said release by said Abraham G. Barnett and of said mortgage to him by said Henry J. Rudisill, and many other matters; all which will more [fully] appear by reference to said bill, now on the files of this court, in this cause, to which said cross complainants pray leave to refer.

And said cross-complainants, complaining, further show to the court that it was prayed in said bill, amongst other things, that the said release executed by said Abraham G. Barnett of said mortgage executed by said Henry J. Rudisill to said John H. Barnett, as to part of the lands embraced in it, should be declared void, and that said mortgage should be declared to be yet in force and foreclosed for the benefit of the complainant, and that the lands de-
392 scribed in it should be sold to make — five-eighths of the
sum due the complainant before sale of any of the lands described in said deed of trust executed by said John H. Barnett to the said complainant; all of which will more fully appear by reference to the amended bill of said complainant now on the files of this court, in this cause, to which said cross-complainants pray leave to refer.

And said cross-complainants show, further, that upon said amended bill and answers thereto by these cross-complainants and said Henry Burgess and the heirs of said Kamm and said Barnetts, Shoaffs, and

Walls and evidence taken under said pleadings said cause was, by agreement, submitted to this court for hearing as to the matters and questions embraced in said amended bill and the answers thereto then on file, with leave to these cross-complainants and said Burgess and the heirs of said Kamm to file a cross-bill after said hearing, if they should desire to do so; that upon such preliminay and partial hearing an interlocutory decree was pronounced by this court, in which it was found and decreed that the release of the mortgage executed by said Henry J. Rudisill to said John H. Barnett entered upon the record thereof by said Abraham G. Barnett, as aforesaid, was null and void for want of power on the part of said Abra-
393 ham G. Barnett to execute the same; that said mortgage
was still in force, and that the complainant, George P. Bissell, was entitled to have foreclosure of the same for the payment of five-eighths of the sum found due on said coupon bonds; all which will more fully appear by the decree of this court then entered, to which said cross-complainants pray leave to refer.

And said cross-complainants shew further that the said Elizabeth Rudisill, after the filing of the complainant's bill aforesaid, sold and assigned to these cross-complainants Simons and Bass the annuity mortgage executed to her by said Henry J. Rudisill as aforesaid, with all arrears of annuity due thereon and all rights secured thereby; that said cross-complainants on the — day of ——, 1880, filed in this cause their cross-bill setting up said mortgage and praying foreclosure thereof, all which will more fully appear by reference to said cross-bill now pending in this cause, and to which said cross-complainants pray leave to refer.

And said cross-complainants show to the court further that said mortgage executed by Henry J. Rudisill to said Abraham G. Barnett as aforesaid was executed solely in consideration of the execution by said Abraham G. Barnett of the partial release aforesaid of the mortgage executed by said Rudisill to said John H. Bar-
394 nett and upon the faith of it and as a substituted security
for the mortgage so released so far as said release purported to discharge the same.

And inasmuch as it has been held and decreed by this court in this cause in the interlocutory decree aforesaid that said Abraham G. Barnett had no power to make said release of the said mortgage given by said Rudisill to said John H. Barnett as was by him attempted, and that said release was therefore void; and inasmuch as the consideration of said mortgage made by said Rudisill to said Abraham G. Barnett has, as between said parties, failed, said cross-complainants do therefore aver that the purchase-money paid by said Burgess, Zollinger, and Kamm to said Rudisill upon the faith of said release ought in equity and good conscience to stand as the consideration of said mortgage executed by said Rudisill to said Abraham G. Barnett, and entitle said purchasers and their assignees to be substituted and subrogated to the place and rights of said Abraham G. Barnett under said mortgage executed to him by said Rudisill as aforesaid.

And inasmuch as the said supposed release executed by said Eliz-

abeth Rudisill of the mortgage executed to her by said Henry J. Rudisill as aforesaid as to the lands conveyed to said Burgess, Zollinger, and Kamm was without consideration and for the sole benefit of said purchasers, and upon the faith of the
395 validity and force of the release of the same lands by said
Abraham G. Barnett as aforesaid; and inasmuch as it has been decreed by this court in this cause that said release executed by said Abraham G. Barnett was void for want of power on the part of said Abraham G. Barnett to execute the same, so that if the writing by said Elizabeth Rudisill as aforesaid upon the record of the mortgage executed to her by said Henry J. Rudisill shall be allowed to stand as a valid release and operate to discharge the lands conveyed to said Burgess, Zollinger, and Kamm from the lien of her said mortgage, said supposed release, instead of operating, as was intended, for the benefit of said Burgess, Zollinger, and Kamm as purchasers, will operate to the injury of them and their assignees by diminishing the fund and security applicable to the payment of said annuity mortgage executed by said Henry J. to said Elizabeth Rudisill, which said annuity mortgage is a prior lien upon the same lands conveyed by said mortgage from Henry J. Rudisill to said Abraham G. Barnett as aforesaid; therefore said cross-complainants do aver that in equity and good conscience the said partial release executed by said Elizabeth Rudisill of her said annuity mortgage as to the lands sold to said Zollinger, Burgess, and Kamm ought to be treated as void and of no effect.

Wherefore said cross-complainants pray that they, together
396 with the defendant Henry Burgess and the heirs of Jacob J.
Kamm, elsewhere named in the record, may be, by the decree of this court, substituted and subrogated to all the rights of said Abraham G. Barnett in and under the said mortgage of said mill property executed to him by said Henry J. Rudisill as aforesaid, and that said mortgage may be foreclosed for the benefit of the said cross-complainants and their codefendants, Burgess and the heirs of Kamm; and that the said writing executed as aforesaid by said Elizabeth Rudisill upon the record of her said annuity mortgage may be declared to be void and inoperative as a release by reason of its defects in form, description, and executed; or, if not upon that ground, then that it may be decreed to be inequitable, without consideration and void as to these cross-complainants and their copurchasers aforesaid, and that if said annuity mortgage shall be foreclosed as prayed for in the cross-complaint of said Simons and Bass, and an order made for the sale of the lands therein described, it shall be directed in such order that the lands embraced in said mortgage other than those embraced in said mortgage of the mill property aforesaid executed by said Henry J. Rudisill to said Abraham G. Barnett shall be first sold and exhausted before resorting
397 for the satisfaction of said annuity mortgage to the said mill
property or any part thereof, and for such other relief as justice and equity shall require.

Wherefore said cross-complainants pray that a writ of subpœna may issue directed to said George P. Bissell, Abraham G. Barnett, Byron Huston Barnett, James William Barnett, Mary Ann Wall, Susan B. Shoaff, Henry J. Rudisill, and Elizabeth E. Rudisill, commanding them to appear before this court and answer this cross-complaint and do and perform all such things as shall be adjudged by this court.

OSCAR A. SIMONS.
JOHN H. BASS.
ANDREW HOFFMEISTER.
MARY J. McCURDY.
ALFRED HATTERSLEY.

R. S. TAYLOR,
Their Solicitor.

EXHIBIT A

(Is the same as Exhibit "A" filed with the cross-bill of Elizabeth Rudisill, and appears on page 64 of this transcript.)

And said Watson Wall, Mary Wall, John A. Shoaff, and Susan B. Shoaff now file their answer to said cross-bill of Simons, Bass, Hoffmeister, and others in these words to wit:

The joint and several answer of John A. Shoaff, Susan B. Shoaff, Watson Wall, and Mary A. Wall to the cross-bill of complaint of John H. Bass and Oscar A. Simons.

398 These defendants to said cross-complaint, now and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said cross-bill contained, for answer thereto or unto so much thereof or such parts thereof as these defendants are advised is material for them to make answer unto, *they* answer and say that they admit that their codefendants, Henry J. Rudisill and Elizabeth, his wife, did execute and deliver to the defendant, Elizabeth Rudisill, the mortgage first described in said cross-bill, and that said mortgage was in the words and figures and bore date and was recorded as in said cross-bill set forth.

And these defendants, further answering, admit that the said Henry J. Rudisill and wife did at the time and in the manner set forth in said cross-complaint convey the portion of said mortgaged premises to said defendant, John E. Hill, and that the portion so conveyed to him is correctly described in said cross-complaint.

And these defendants, further answering, say that they have no knowledge as to what is due upon said mortgage for or on account of installments past due, or whether there is any sum due thereon, nor have they any knowledge as to the truth of the allegations contained in said cross-complaint that said mortgage has been assigned by the said Elizabeth Rudisill to said cross-complainants.

399 And they, further answering, say that they are acquainted with said Elizabeth Rudisill, and that she is an old woman between seventy-three and seventy-five years old and feeble and not likely, as they believe, to survive any great length of time; that her health has been very much impaired during the last two years by

severe illness, from which she has not so recovered as that she possesses the health and strength she possessed prior to such sickness. They admit that prior to said sickness she possessed such health and strength as persons of the age of seventy-three years ordinarily possess, but they wholly deny that she, the said Elizabeth, has any such expectation of life as to make the present value of said future annuities to become due on said mortgage of the value of $5,000; that these defendants are unable to answer as to what said present value of such future installments to become due on said mortgage are worth, but these defendants, further answering, say that at or about the time the said cross-complainants so purchased said mortgage of said Elizabeth Rudisill, as set forth and averred in said cross-complaint, they also purchased the fee-simple of said mill and mill property, and paid therefor with their own money: but, to conceal and fraudulently cover up such purchase and to strive to prevent the just and equitable application of the rents and
400 profits arising upon said premises and out of their use and
occupancy thereof from being duly and equitably applied to the payment of such installments as should from time to time become due upon said mortgage, they caused the deed or deeds conveying the title to said premises upon such purchase to be executed to one George Esmond, who paid no part of the purchase-money, and who has never, as these defendants are informed and believe, had any possession or control of said premises whatever, except to hold the same for said cross-complainants.

And these defendants, further answering, say said cross-complainants have had and held possession of said premises ever since their said purchase thereof, and had and received the rents, issues, and profits thereof.

And they, further answering, say that said mill property is very valuable and productive, and yields or ought to yield in clear profits at least $2,000 per annum, and that said sum is not over a fair rental value therefor during the time the cross-complainants have so held possession thereof, and that the same will and ought to rent for said sum of $2,000 a year for the time to come covered by said annuity mortgage, and that if said mortgage- premises shall be ordered to be sold subject to the lien of said cross-complainants for their future installments, the same will be abundantly secure
401 to them if they have any equitable right to a foreclosure and
sale of such premises when they are the absolute owners of the same.

And these defendants, further answering, say that said portion of said mortgage-promises so conveyed to said George Esmond in trust for said cross-complainants, as aforesaid, is of great value and now worth, as they believe, more than $20,000, and that the same and the rents and profits thereof so received by said cross-complainants are worth much more in cash than all the installments now due and the present value of all that can ever become due on said annuity, mortgage, and any and all amounts advanced by the cross-complainants, or that they will have to advance to repair said mill property, and these defendants ask that an account may be taken of what is justly due to the said cross-complainants upon said mortgage or otherwise, and that also the value of the said mill property so purchased by them and held in trust for them as aforesaid and that said property so purchased by them may be decreed to be a cancellation and payment of their said mortgage debt, and that the same is and ought to be deemed paid and satisfied so far as these defendants are concerned.

And these defendants, further answering, say that they admit, as averred in said cross-complaint, that said Henry J. Rudisill and his
wife did execute a mortgage on part of the property so cov-
402 ered in the cross-complainants' said mortgage, but upon
another and different part thereof than said mill property so purchased and now held by said cross-complainants to secure said bond in said cross-complainant described, for $10,000, so executed by said Henry J. Rudisill to said John H. Barnett, deceased, to secure the payment to the plaintiff, George P. Bissell, of the said $5,000 so received by said Henry J. Rudisill, the same being part of a loan of $8,000 so made by said Bissell to said Rudisill and said Barnetts; and these defendants deny that the said $5,000 was a loan to said Freeman, but say that it was a loan made to said Henry J. Rudisill, as declared in his said bond, and that such loan was and is the consideration upon which said bond was given.

And these defendants, further answering, say they admit the death of said John H. Barnett, as alleged in the said cross-complaint, and at the time therein stated, and that he died testate, and by his will devised a life estate in the premises so mortgaged by him to secure the loan so made by said Bissell to him and said Rudisill and said A. G. Barnett to these defendants, Mary A. Wall and Susan B. Shoaff, but they wholly and entirely deny that said will authorized said A. G. Barnett to act as executor and settle up or take charge of said estate without taking out letters testamentary and filing bond and
taking the oath as required by law. They further admit that
403 said A. G. Barnett, as they are now informed, and believe such
information true, did not take out letters testamentary upon said will, nor give bond, nor take the oath of office, or in any way qualify as executor of said will, all of which was wholly unknown to these defendants until since the commencement of this suit. And they admit that said A. G. Barnett did intermeddle to some extent, as they are informed, and believe such information to be true, but at the time that they obtained such information that he, said A. G. Barnett, was claiming to act as such executor of said will they were informed and believed he was such executor and duly appointed and authorized to act as such. And these defendants deny that said A. G. Barnett ever executed the trusts declared in said will, except to collect a few installments of rent accruing upon the property so devised for life to these defendants, Susan and Mary, and dispose of the same as directed by said will, and they say that during all the time he was so acting they, these defendants, supposed he was regularly and duly appointed and authorized to so act.

And these defendants, further answering, admit that said defendants, Rudisill and wife, did execute to said Barnett a mortgage con-

veying to him, said Barnett, the land therein described, as set forth in said cross-complaint, and which they admit was part of the land
covered by the said cross complainants' said mortgage, and
404 that said mortgage was, as they are informed, to secure the
performance of the conditions of said bond, as averred in said
cross-complaint.

And these defendants, further answering, deny that they, or either of them, ever authorized the taking of said mortgage by said A. G. Barnett, or any of his acts in or about the same done by him, or that they ever accepted or now accept the same as a security of the said bond for $10,000 so executed by said Rudisill to said J. H. Barnett, or that these defendants, or either of them, ever have in any way ratified or accepted the same, or aided or abetted, or are aiding or abetting, the plaintiff, George P. Bissell, in the foreclosure of the same, but, on the contrary, they and each of them did, as soon as they heard said A. G. Barnett took said mortgage, repudiate*d* all claim to the same and wholly reject*ed* all interest or connection therewith.

And these defendants, further answering, say they admit there is a large flouring mill, dam, and race on the mortgaged premises of large value and constituting the chief value thereof, as set forth in said cross-complaint, but whether the same was, at the time said cross-complaint was filed or at any other time, liable to damage by water or otherwise these defendants have no knowledge further than they are informed by said cross-complaint, but they say that if said
premises were or are so liable to be injured, and any protec-
405 tion by the investment of money or otherwise is necessary to
protect the same, it is the business and privilege of the said
cross-complainants to do and furnish the same, as they are the absolute owners in equity thereof, as aforesaid, but that any such repairs cannot and in equity ought not to add any additional burden whatever to the said premises so mortgaged by said Henry J. Rudisill and wife to said J. H. Barnett to secure the payment of said $5,000, part of the money so also secured by said plaintiff's said mortgage upon said premises so devised to said Mary and Susan.

And these defendants, further answering, say that said cross-complainants cannot, nor ought they to, enforce their said mortgage in any way whatever upon the portion of the premises originally covered by it and described as follows, to wit: A part of the S. E. ¼ of sec. 35 and part of lot 8, in Wells' pre-emption, all in township 31, range 12 east, more clearly described as follows: Commencing two feet east of the southwest corner of lot No. 1, in Eckert's addition to Fort Wayne, in said sec. 35; thence west along the south line of said addition to the water-line of the canal feeder; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson & Saginaw railroad; thence southeasterly along said right of way to the center of the Bloomingdale road;
thence northeasterly with the center of said road to its inter-
406 section with the north line of Elizabeth street; thence with the
north line of said street to a point due north of the northwest
corner of lot eleven, in Rudisill's subdivision of part of lot 8 in Wells'

pre-emption; thence northerly, at right angles to said street, 343 feet; thence easterly parallel with said Elizabeth street 387 feet to the west line of the St. Joe road; thence northerly with the line of said road 212 feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of beginning; that before the said Elizabeth Rudisill assigned said mortgage described in said cross-complaint as aforesaid she duly executed and entered on the margin of the mortgage record where the same was recorded in the recorder's office of Allen county a release of said premises in the words and figures following:

> "I hereby release any and all liens by reason of this mortgage of the premises therein described the following, viz: that part of the S. E. ¼ fr. quarter of sec. 35, township 31, R. 12, conveyed by H. J. Rudisill to Henry Burgis, Charles A. Zollinger, & John J. Kamm by deed dated July 23, 1875.
>
> "ELIZABETH RUDISILL."

That the part of said premises so released was described in said deed to Burgess, Zollinger, and Kamm as above specifically specified and described.

And these defendants answering aver that such release was a good and valid release and made to said Rudisill when he had 407 property and was abundantly able to pay said bond, and was intended by the said Elizabeth Rudisill to be and in fact was a total and absolute relinquishment by her of all claim by her to her said mortgage lien to or on said part of said premises so released, and she never has or intended to have or to hold any lien thereon since such release was made, and never transferred or intended to transfer to the plaintiffs in said cross-complaint any right to a lien, by virtue of such mortgage so transferred, to said premises so released therefrom by her, nor did she sell or transfer any such lien to them, but the said mortgage was assigned and sold to them by her just as it was, and discharged and released as it was by such release on the part of the premises aforesaid. Wherefore they say that said mortgage sued on in said cross-complaint is no longer a lien upon the said premises so released and described last aforesaid.

And these defendants, further answering, say that said released premises constituted and are part of the premises so mortgaged by said Henry J. Rudisill to John H. Barnett, deceased, as aforesaid, and that the balance of said premises so mortgaged to said J. H. Barnett is liable to be sold to pay the debt secured thereby; and if, in the opinion of the court, the said cross-complainants' said 408 mortgage is not fully satisfied and paid by the property so conveyed to them, then the same, in equity, should be made out of the sale of said mill property before the portion of said property so covered by said mortgage to said John H. Barnett, and not so released by Elizabeth Rudisill, should be sold to make said mortgage debt secured by said annuity mortgage.

And these defendants deny that there is any other matter or thing in said cross-complaint material or necessary for them to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, or denied; all of which matters and things these defendants are ready and willing to aver, maintain, and prove to this honorable court as it may direct, and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf by them expended.

J. A. SHOAFF.
SUSAN R. SHOAFF.

Subscribed and sworn to before me this 14th day of June, 1881.
[NOTARIAL SEAL.] ELIJAH BARTON,
Notary Public.

And said Abraham G. Barnett now files his answer to the cross-bill of Simons, Bass, Hoffmeister, *et al.*, in these words, to wit:

The answer of A. G. Barnett to the cross-complaint of Oscar A. Simons and John H. Bass.

409 This defendant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefits and advantages of exceptions which can or may be had or taken to said cross-complainants' cross-complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to answer, *and* says that he admits that said Henry J. Rudisill and wife executed to the said Elizabeth Rudisill the mortgage on the premises therein described, and for the purposes set forth in said cross-complaint, and that the same was duly recorded in the mortgage records of Allen county, as set forth in said cross-complaint, and that said conveyance of the undivided half of said mill property, being part of the premises so mortgaged to said Elizabeth, was executed by said Henry J. Rudisill and wife to said Hill. The part being so conveyed is correctly described in said cross-complaint, and as to the sale of said mortgage by said Elizabeth Rudisill to said cross-complainants he has no knowledge, except from hearsay and from the averments in said cross-complaint.

And this defendant, further answering, says that he has no knowledge, except from the averments in said cross-complaint, as to what sum or sums are due upon said mortgage, and asks strict proof to be made concerning the same, and he denies that the present value of the future installments of said annuity is $6,000, and he says that the plaintiff ought not to be allowed to recover any sum upon 410 said cross-complaint on account of such future installments not yet due, but the said premises could, as he believes, and ought, as he is informed, be sold for any amount now due, subject to the lien for said future installments which could be paid and more than paid out of the net profits annually arising from said mortgaged premises. And he says that the expectancy of the life of said Elizabeth Rudisill is not ten years, nor, as this defendant believes, not over five years; that she had a hard spell of sickness during the past year, which greatly injured her constitution; that she is not by any means so vigorous or robust as before, and has now no greater chances for long life than any other person of her age. He further says that he believes the present value of said annuity for the future is not more than $4,042.

He, further answering, says that he admits that said Elizabeth released all the lands covered by her said mortgage lying west of the said feeder on said 4th January, 1869.

And this defendant, further answering, says that he admits that said Bissell loaned $8,000, and took as security for said loan the coupon bonds of the said J. H. Barnett and this defendant and a trust deed from said J. H. Barnett; but he, further answering, says that said money was not loaned to said J. H. Barnett alone, nor to him and this defendant, but to him and said Henry J. Rudisill; that this affiant was present when the negotiation 411 took place and the contract was made between said Bissell, the said J. H. Barnett, and said Rudisill; that said Bissell acted through his agent, John Hough, and this defendant, J. H. Barnett, and Henry J. Rudisill were present in person, and the agreement was that said Bissell should loan said sum of $8,000, $5,000 of which should go to said Henry J. Rudisill and $3,000 thereof should go to said J. H. Barnett, and this defendant was to sign said bonds as surety for said loan for the parties receiving the proceeds thereof, and it was then and there agreed that said Rudisill should execute his bond for $10,000, conditioned for the payment of said $5,000 and the interest thereon to said George P. Bissell, and secure the same by the mortgage in said cross-bill described, and this defendant denies that said $5,000 was borrowed by said J. H. Barnett and loaned to said Newton B. Freeman, and says that said Freeman was not connected with the loan of said money in any manner whatever, and was at no time present during the progress of said negotiation, but he is informed and believes said Freeman made an agreement with said Rudisill to get the money of him, and this defendant says upon such agreement the said Freeman did get said money and use the same in his business, but not upon any negotiation whatever with this defendant or said John H. Barnett or them jointly or otherwise; and this defendant 412 says that this same question was presented to this court on the hearing at Indianapolis and fully argued and considered, and this honorable court by its interlocutory decree rendered passed upon said facts and decreed that said money was loaned to said Rudisill, and that he was liable to pay the same as he had by the terms of his said bond and mortgage agreed.

He admits that the lands described in said Rudisill's mortgage to John H. Barnett were part of the lands described in said mortgage to his mother, Elizabeth Rudisill. He also admits that said J. H. Barnett died at the time stated in said cross-bill testate, and that his will was duly probated, and that this defendant was nominated as executor in said will, and that the paper filed purporting to be a copy thereof is a correct copy of the same; and he also admits that he believed at the time that such nomination constituted him such executor, and he collected some small sums of money due said testator and a small amount of rent from his real estate, and paid some small debts and the expenses of transferring their parents to

the new cemetery, but that the whole amount so passing through his hands he believes would not exceed $1,200 or thereabouts; that he acted upon the belief that he was executor and without consulting any one as to his right to do so; that his sisters Susan
413 and Mary were, as he understood, displeased at this defendant, and he did not consult with them in the matter; but when they asked to know by what authority he was acting he informed them that he had full power from the court to act, and he believes they supposed during all the time he was collecting and paying out said money he was regularly constituted the executor of the estate; but he says that his acts in collecting and disbursing said moneys only continued for a period of about, or a little over, a year after said J. H. Barnett's death, when all parties interested in said estate, by themselves or their friends, took possession of their, and each of their, interests in said estate, and the whole control or claim to control the same in any manner whatever had long ceased by 1875.

He admits that said H. J. Rudisill sold part of the land mortgaged to J. H. Barnett to Burgess, Zollinger, and Kamm, and that prior to such sale this defendant, on the advice of the brother-in-law of said Rudisill, assumed to release the property conveyed to them from said mortgage to said J. H. Barnett, and in lieu thereof, and as a substituted security in its place, he took the mortgage on said mill property; that said Rudisill at the time represented to him that said mortgage on the mill property would be a first lien thereon, and would be better security for said $10,000 bond than the
414 mortgage to said J. H. Barnett was; that said Rudisill did not, neither did his said brother-in-law, inform this defendant that said Elizabeth Rudisill held at the time a mortgage on said mill property, or he would not have taken a second mortgage thereon.

He admits that the said Elizabeth Rudisill, on the 23rd day of January, 1875, voluntarily released her mortgage lien on the property sold to Burgess, Zollinger, and Kamm, and that release was made by her without any consideration, and that the terms of said release, so entered upon the margin of the record of her mortgage, were as set forth in said cross-complaint; but he says that he is advised that said release is not void for any of the reasons stated in said cross-complaint. He admits that the complainant, Bissell, instituted this suit and filed his bill and amended bill, as set forth, and that the same contained the averments and parties named in said cross-complaint.

All which matters and things this defendant is ready to aver and prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

A. G. BARNETT.

NINDE & ELLISON, *Solicitors.*

Subscribed and sworn to before me.

NOBLE C. BUTLER, *Clerk.*

415 And said Simons, Bass, Hoffmeister, and others file their replication to the answers of the defendants, Walls, Shoaffs, and Barnett, to their cross-bill in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

The replication of Oscar A. Simons and John H. Bass to the answers of George P. Bissell, Abraham G. Barnett, Watson Wall, Mary Wall, John A. Shoaff, and Susan B. Shoaff to the cross-bill of these repliants.

The said repliants, reserving to themselves all exceptions to the insufficiencies of said answers and each of them, for replication thereunto and to each of them say that they will aver and prove their said cross-bill to be true, certain, and sufficient in law to be answered unto, and that the said answers of said defendants, and each of them, are uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answers, or either of them, contained material in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said cross-bill they have already prayed.

416 OSCAR A. SIMONS.
JOHN H. BASS.

R. S. TAYLOR, *Solicitor.*

And the said Henry Burgess, Hannah Kamm, Andrew J. Kamm, and others now file their cross-bill, with exhibits, in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.
In Chancery.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

To the honorable the judges of the circuit court of the United States for the district of Indiana:

Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, George L. Kamm, and Charles Kamm, Harry Kamm, Anna Kamm, and Nellie Kamm, infants, by Samuel R. Alden, their guardian *ad litem* and next friend, citizens of the State of Indiana, bring this their cross-bill of complaint against George P. Bissell, of Hartford, Connecticut, and a citizen of the State of Connecticut; Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, Byron Huston Barnett, and William Barnett, his infant children; Susan B. Shoaff and John A. Shoaff, her husband; John E. Hill, Elizabeth Rudisill, citizens of the State of Indiana; Mary Ann Wall and Watson Wall, her husband, citizens of the State of Missouri; Henry J. Rudisill and Elizabeth E. Rudisill, his wife, citizens of the State of California.

And thereupon your orators and oratrices, complaining, aver that said George P. Bissell on the 28th day of February, 1879,
417 filed in this court his bill of complaint, on the 22nd day of
April, 1879, his supplemental bill, and on the 4th day of February, 1880, his amended bill against your orators and oratrices, Oscar A. Simons, John H. Bass, Charles A. Zollinger, Andrew C. Hoffmeister, Mary J. McCurdy, Alfred Hattersley, and the remaining defendants hereto, which cause is still pending, and in which this cross-bill is exhibited, wherein said George P. Bissell, in the capacity of trustee for persons to your orators and oratrices unknown, seeks the foreclosure of a certain trust deed to him executed by John H. Barnett, deceased, bachelor, brother of the defendant, Abraham G. Barnett, to secure the eight joint $1,000 bonds of said John H. and Abraham G. Barnett executed and delivered to George P. Bissell & Co. July 15, 1869, which said deed of trust conveyed to said George P. Bissell all of lot 105 on the original plat of the city of Fort Wayne, except a strip ten feet wide off the east side thereof, and a part of lot 106 on said original plat, commencing at a point on the east line of said lot thirty feet south of the northeast corner thereof, running thence south along said line twenty feet, thence west at right angles therewith to the west line of said lot, thence north along said west line twenty feet, thence east at right angles therewith to the place of beginning—all in Allen county and State of Indiana; and wherein said George P. Bissell further seeks the foreclosure of a mortgage dated December 13th, 1871, executed
418 by the defendants, Henry J. Rudisill and Elizabeth E. Rudisill,
his wife, purporting to secure a bond of even date therewith executed by said Henry J. Rudisill to said John H. Barnett in the penal sum of $10,000 to secure the payment to George P. Bissell of certain coupon bonds bearing date July 15, 1869, to the amount of $5,000, which mortgage said Bissell, in his said bill, alleges to have been executed as additional security for said $8,000 loan, in accordance with an agreement made between himself, said Rudisill, and said J. H. Barnett prior to the making of said $8,000 loan, and wherein said George P. Bissell further seeks to have a release by said defendant, Abraham G. Barnett, of said last-mentioned mortgage as to that portion of the premises thereby conveyed which were sold and conveyed to said Charles A. Zollinger, your orator, Henry Burgess, and J. J. Kamm, the deceased husband and father of your orators and oratrices, Kamm, in January, 1875, by the defendants, Henry J. Rudisill and wife, set aside and declared void, and wherein said George P. Bissell also seeks the foreclosure of a mortgage dated January 23, 1875, executed by said Henry J. Rudisill and wife to said Abraham G. Barnett, for the benefit of himself and the estate of said John H. Barnett, to secure the performance of the conditions of a certain bond executed by Henry J. Rudisill to John H. Barnett dated July 15, 1869, and recorded in the
419 miscellaneous record No. 6, page 236, of the records of Allen
county, Indiana.

And your orators and oratrices aver that said George P. Bissell & Co. made said $8,000 loan solely to said Barnett brothers and on the faith of their said eight joint bonds for the sum of $1,000 each and said trust deed of said John H. Barnett, deceased, copies of all which are filed as exhibits with said complainant Bissell's amended bill, to which and the originals now before this court your orators and oratrixes beg leave to refer as part hereof; and, further, that said Bissell and said Bissell & Co. were, until after the filing of said bill by their solicitors, totally ignorant of the exist*an*ce of said mortgage executed by said Rudisill and wife to said John H. Barnett December 13, 1871, or of said Rudisill bond, dated July 15, 1869, or of any arrangement or agreement upon which either said bond or said mortgage were given, and were not parties to the alleged agreement by said Rudisill to secure or pay any portion of said $8,000 to said Rudisill.

Further, your orators and oratrices aver that said Henry J. Rudisill executed said bond dated July 15, 1869, and recorded in volume 6, at page 236, of the miscellaneous records of Allen county, Indiana, a long time subsequent to the making of said $8,000 loan to said brothers Barnett without receiving any part of said $8,000 loan *n*or any benefit or consideration whatever for the execution of said bond
except a verbal promise of said John H. Barnett, deceased,
420 which was never fulfilled, and cannot now be fulfilled, and
that since said time said Rudisill has received no benefit or consideration whatever for said bond.

Your orators and oratrices further aver that said mortgage dated on the 13th day of December, 1871, was drawn for said brothers Barnett by their agent, and that said brothers Barnett, having learned that said Rudisill was becoming involved, by persistent importuning procured said Rudisill and wife to execute the same: that the description therein contained is as follows: All that portion of the fractional southeast quarter of section thirty-five (35), in township thirty-one north, of range twelve east, in Allen county, Indiana, bounded on the east by the St. Joseph's river, south by the Bloomingdale road, west by the feeder of the Wabash and Erie canal, and on the north by the lands of Julia A. Freeman, estimated to contain thirteen acres; that the condition thereof is in the following words and figures: "To secure the payment of the following-described bond, to wit: A bond of even date herewith to secure the payment to George P. Bissell of certain coupon bonds bearing date July 15, 1869, to the amount of five thousand dollars, as fully recited in said bond given by said mortgagor to the said mortgagee;" and that said Rudisill *and* executed the same without any consideration whatever therefor, unless as
indemnity for money theretofore advanced to one Newton B.
421 Freeman, partner in business with said brothers Barnett.

Further your orators and oratrices aver that shortly thereafter, to wit, on the — day of January, 1872, said John H. Barnett died, testate, at the house of his said brother, Abraham G. Barnett, with whom he had been living for years prior thereto, and that said Abraham G. Barnett, after reading the will of said John H. Barnett, a copy of which is herewith filed as a part hereof, marked Exhibit A, and, discussing its provisions with the legatees and devisees of said testator, duly probated the same and entered upon the

performance of the duties and trusts thereby vested in him as the same were then understood and agreed upon by and between himself and his sisters, the defendants, Susan B. Shoaff and Mary Ann Wall; that said J. H. Barnett, by his said will, expressly authorized and empowered said Abraham G. Barnett by name to assume and exercise the entire, exclusive, and absolute control and disposal of all personal property of every description whatever owned by said testator at the time of his death, and for an indefinite period to have and receive the use, rents, and profits of all testator's real estate in trust for the following purposes, to wit, to pay said testator's debts, funeral expenses, debts of last illness, to purchase and improve
422 a lot in Lindenwood Cemetery, in the city of Fort Wayne, and pay for exhuming the remains of testator's father and mother, reinterring them in said lot, and for the erection of a monument thereon suitable to their condition in life; that said testator, up to the time of his decease, had for many years lived with his said brother Abraham, and reposed in him the most implicit trust and confidence, and that said brothers Barnett had and held all their property in common, and were partners in all their business undertakings and in the use, enjoyment, and management of all their property, whether in the name of said John H. or Abraham G. Barnett.

Your orators and oratrices further aver that said Henry J. Rudisill, in the month of January, 1875, for the purpose of paying off and redeeming manifold mortgage, tax, and judgment liens and sheriff's sales encumbering his real estate, sold and conveyed by warranty deed duly recorded, in which his wife joined, to Charles A. Zollinger and J. J. Kamm for $5,000 cash one undivided half and to Henry Burgess for $5,000 cash the remaining undivided half of the following real estate situate, lying, and being in the county of Allen and State of Indiana, to wit: A part of the southeast quarter of section thirty-five (35) and a part of lot number eight (8) of Wells' pre-emption, all in township thirty-one (31) north, of range twelve (12) east,
423 more clearly described as follows: Commencing twenty-one feet east of the southwest corner of lot number one, in Eckert's addition to the city of Fort Wayne, in said section thirty-five; thence west along the south line of said addition to the water line of the feeder to the Wabash and Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson & Saginaw railroad; thence southeasterly along the said right of way to the center of the Bloomingdale road; thence northeasterly with the centre of said road to its intersection with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot eleven in Rudisill's subdivision of part of lot eight of Wells' pre-emption; thence northerly at right angles to said street three hundred and forty feet; thence easterly parallel with said Elizabeth street three hundred and eighty-seven feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve feet; thence west parallel with Elizabeth street to a point due south of the place of beginning; thence north to the place of begin-

ning, a copy of which deed is filed as an exhibit herewith, marked Exhibit B; that, except about $200, said entire $10,000 was applied
in paying off judgment, tax, and other liens on said Rudisill's
424 real estate, and that all incumbrances then resting on said
real estate, except an annuity mortgage to Elizabeth Rudisill hereinafter mentioned, were, at the time of said purchase, so far as appeared from the records of Allen county, Indiana, formally released and satisfied: that said Abraham G. Barnett, acting for himself and in good faith as executor *de facto*, trustee, and agent of the estate of his deceased brother, for himself and in behalf of the devisees and legatees of said testator, prior to the consum-ation of the aforesaid purchase, agreed with said Rudisill to release, and did releas, said premises purchased as aforesaid from any and all lien by reason of the mortgage heretofore mentioned from Henry J. Rudisill and wife to John H. Barnett, which mortgage purported to be a lien on the greater portion of said premises, in consideration of the conveyance by said Henry J. Rudisill and wife by their mortgage deed to him, A. G. Barnett, for the benefit of himself and of said estate of his deceased brother, of all that tract of land known as the St. Joe mill property, lying partly in section thirty-five and partly in section thirty-six, in township thirty-one north, of range twelve east, in Allen county and State of Indiana, and described in said mortgage as commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' pre-
emption; thence with the centre of the St. Joe road
425 northerly to a point where the St. Joe turnpike intersects the
same; thence easterly along the centre of said turnpike to the west quarter-post of section 36, in said township and range; thence southeasterly with the eastern boundary of said mill-site to the bank of St. Joe river; thence westerly with said river to the place of beginning, containing fifteen acres, more or less—which mortgage is conditioned in words and figures as follows, to wit: To secure the payment of the amount annexed and the performance of the conditions recited in a certain bond executed by Henry J. Rudisill to John H. Barnett, dated July 15, 1869, and recorded in the miscellaneous record No. 6, page 236, of the records of Allen county, Indiana—copies of which mortgage and bond are filed herewith as part hereof, marked Exhibit C and Exhibit D; that said Henry J. Rudisill and wife duly executed and delivered said mortgage to said Abraham G. Barnett, and that the same was duly recorded on the 26th day of January, 1875; that said A. G. Barnett, as evidence of said release of said mortgage to John H. Barnett, executed on the margin of the record thereof, prior to the consum-ation of said sale to Burgess, Zollinger, and Kamm, an entry of release and satisfaction thereof in words and figures as follows, to wit: "I hereby release from any and all lien, by reason of this mortgage, the follow-
ing of the premises herein described: On that part of the S.
426 E. ¼ of section 35, t'p 31, R. 12 east, this day conveyed by the
said Henry J. Rudisill to H. Burgess, Chas. A. Zollinger, and J. J. Kamm. Witness my hand and seal as such executor Jan. 23, 1875. Abraham G. Barnett, executor of the estate of John H. Bar-

nett, deceased"—which was duly attested by the recorder, and a copy of which release is filed herewith; that said Rudisill, not knowing as a matter of fact that said A. G. Barnett had never technically qualified as executor of his deceased brother's estate, but knowing said brothers Barnett and their former business relations and the terms of said will, and being advised by the attorney of said A. G. Barnett that said release was valid, executed said mortgage to said A. G. Barnett on said St. Joe mill property, in good faith, as the consideration for said release, and that said Burgess, Zollinger, and Kamm made said purchase in good faith and in the belief that all encumbrances on said premises so purchased, except said annuity mortgage, were fully paid and satisfied, and were entirely ignorant of the fact that said A. G. Barnett had not qualified, given bond, and taken out letters testamentary as executor of his deceased brother's estate, and had no knowledge or suspicion that there was anything informal or questionable about said entry of release by A. G. Barnett, or that its validity was open to question, and were in fact ignorant of the exist*a*nce of said mortgage to John H. Barnett.

427 That said St. Joe mill property and the premises purchased as aforesaid by said Burgess, Zollinger, and Kamm were at the time of said release and had been for years prior to the execution of the mortgage so appearing to be released encumbered by a mortgage from said Rudisill and wife to Elizabeth Rudisill to secure an annuity of $800 duly executed, delivered, and recorded some years prior to any of the transactions hereinbefore mentioned, but that over and above said encumbrance said mill property was at the time of said release worth several thousand dollars more than the premises sold as aforesaid to said Burgess, Zollinger, and Kamm.

Your orators and oratrices aver further that said annuity mortgage was executed by said Henry J. Rudisill and wife to said Elizabeth Rudisill as the purchase price of the lands thereby conveyed, described as follows, to wit: The south half of the northeast quarter, containing fifty-seven $\frac{76}{100}$ acres; the north half of the southeast quarter, containing fifty-eight & $\frac{12}{100}$ acres, and the southeast fraction, containing twenty & $\frac{22}{100}$ acres, all in section 35, in township 31 north, of range 12 east, in Allen county and State of Indiana, saving and excepting therefrom all that part of said premises, lying south of a lane running westerly from the mill thereon and west of the St. Joseph's State road as now travelled, supposed to contain about seven acres, and
428 also saving and excepting therefrom that portion of said
premises heretofore sold to Henry C. Gray, Maria C. French, and Julia A. Freeman; that said Elizabeth Rudisill, at the time said purchase by said Burgess, Zollinger, and Kamm was consum-ated, released to them from the lien of her said annuity mortgage the premises by them so purchased for the purpose of perfecting their title and as part consideration for the $10,000 by them agreed to be paid, and afterwards paid to and for said Henry J. Rudisill, so as to enable her said son to make said sale; that at the time of making such release said Elizabeth Rudisill was ignorant of

the existence of any of the aforementioned mortgages or of any mortgage liens except her own annuity mortgage upon any of the property by her said mortgage covered.

Further your orators and oratrices aver that said annuity mortgage covers all the property described in both of said mortgages executed by Henry J. Rudisill and wife to John H. and Abraham G. Barnett respectively, except the following-described piece of land, which is included only in said mortgage to A. G. Barnett, to wit: Beginning three chains and forty-six links south of the east quarter-post of section 35, in township 31 north, of range 12 east, in Allen county and State of Indiana; thence south 23½ degrees east six chains and ten links; thence south 65½ degrees east eleven (11)
chains and fifty links; thence south 12¼ degrees west one
429 chain and forty-five links; thence westerly with the St.
Joseph's river to the dividing line between said section 35 and section 36 in the same township; thence northerly to the place of beginning; that said mortgage to John H. Barnett includes in its description the following real estate not included in said Burgess, Zollinger, and Kamm purchase, nor in the lands described in said mortgage to Abraham G. Barnett of the St. Joe mill property, to wit, the triangular piece containing one-fourth of an acre, bounded on the south by the old Bloomingdale road, on the west by North Lafayette street, and on the north by Burgess avenue; also the following residence property, on which is a two-story residence and outbuildings bounded as follows: On the west and south by Burgess, Zollinger, & Kamm's addition to the city of Fort Wayne, on the east by the center line of the St. Joseph road, and on the north by the projected north line of said addition, containing one-third of an acre.

Your orators and oratrices further aver that said John H. Bass and Oscar A. Simons, parties defendant to the bill of complaint of said George P. Bissell, as well as hereto, have purchased and are by cross-bill seeking a foreclosure of said annuity mortgage in this action; that the defendant, John E. Hill, in the fall of 1875, purchased
an undivided one-half interest in the said St. Joe mill prop-
430 erty, and that the same has been duly conveyed to him by
said Henry J. Rudisill and wife; that the defendants, Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, Byron Huston Barnett, William Barnett, Susan B. Shoaff and John A. Shoaff, her husband; Mary Ann Wall and Watson Wall, her husband, devisees under the will of said John H. Barnett, to the copy of which filed herewith reference is hereby made for their specific interests, claim some interest in both said mortgages to John H. Barnett and said Abraham G. Barnett hereinbefore set forth and the premises therein described.

Your orators and oratrices further aver that the agent of said George P. Bissell and George P. Bissell & Co., in the negotiation of said $8,000 loan to said Barnett brothers, also acted as the agent of said brothers Barnett in procuring said $10,000 bond of Henry J. Rudisill and the mortgage dated December 13th, 1871, to John H. Barnett, and was also consulted by said Rudisill about the release

of said mortgage by A. G. Barnett and the substitution of said mortgage on the St. Joe mill property executed to said A. G. Barnett as aforesaid, and consented to said release and the execution of said mortgage to A. G. Barnett in substitution for the lien so released, and that said Bissell and Bissell & Co. knew nothing whatever of said transactions at the time, but have ratified said acts of
431 their agent since the commencement of this suit.

Further, your orators and oratrixes aver that the entire settlement of said John H. Barnett's estate up to the present time, including the collection and disbursement of thousands of dollars, the management and care of decedent's real estate, the payment of all debts of the estate, except upon said eight $1,000 bonds to said Bissell & Co., and the settlement of the credits and liabilities which led to the execution of said Rudisill bond and two mortgages, and the performance of the specific trusts imposed upon him by his brother's will, has been managed and executed by said Abraham G. Barnett alone, with the knowledge and consent of all persons interested in said estate, and in the belief by all the devisees and legatees of said estate that said will alone gave him ample authority to absolutely control and dispose of the personalty according to his discretion.

To the end, therefore, that said defendants may, upon their several and respective corporal oaths, full, true, direct, and perfect answers make to all matters hereinbefore stated and charged as fully as if the same were hereinafter repeated, and each of them thereunto distinctly interrogated, and that the defendant, George P. Bissell, may, upon his corporal oath, to the best of his knowledge, information, remembrance, and belief, full, true, direct and perfect answers
432 make to the interrogatories hereinafter numbered and set
forth, as by the note hereinunder written he is required to answer, and that the title of your orators and oratrices to the lands by said Burgess and J. J. Kamm, deceased, purchased as hereinbefore shown from said H. J. Rudisill, be quieted in them, and that said mortgage, dated on the 13th day of December, 1871, executed by Henry J. Rudisill and wife to John H. Barnett, deceased, be decreed to be fully satisfied and discharged as to such lands, or if, in the opinion of this honorable court upon the pleadings and evidence, said mortgage is, as against said premises, a valid existing lien, subject to enforcement in favor either of said Bissell or the beneficiaries of said J. H. Barnett's estate, that an account may be taken of what is due said John H. Bass and Oscar A. Simons on said annuity mortgage, and for repairs ordered by this court, which are a lien on said St. Joe mill property, and that the defendant, George P. Bissell, and the representatives of said John H. Barnett's estate be decreed to pay the same, or a proper proportion thereof, as a condition precedent to the sale, for their benefit, of said Burgess, Zollinger, and Kamm purchase; that your orators and oratrices and remaining owners of lands purchased by said Burgess, Kamm, and Zollinger, as aforesaid, be subrogated to said mortgage on the St. Joe mill property, dated January 23rd, 1875, and executed by said
433 Henry J. Rudisill and wife to said A. G. Barnett for the benefit of himself and said estate of John H. Barnett, deceased,

in consideration of said release of the said Burgess, Zollinger, and Kamm purchase; that an account may be taken of what, if anything, is due from said Henry J. Rudisill on said bond dated July 15th, 1869, and secured by said last-mentioned mortgage, and that such mortgage be foreclosed for the benefit of your orators and oratrices and the owners of the remaining one-fourth of said Burgess, Zollinger, and Kamm purchase, and the premises therein described sold, or so much thereof as may be necessary to make such amount, and that such other and further relief as may be just and proper in the premises and agreeable to equity be granted to your orators and oratrixes.

And may it please your honors to grant unto your orators and oratrices the writ of subpœna, to be directed to said defendants, George P. Bissell, Abraham G. Barnett, Nancy Catharine Barnett, a minor; Susan M. Barnett, a minor; Byron H. Barnett, a minor; William Barnett, a minor; Susan B. Shoaff, John A. Shoaff, John E. Hill, Elizabeth Rudisill, Henry J. Rudisill, Elizabeth E. Rudisill, Mary Ann Wall, and Watson Wall, commanding them and each of them to personally be and appear before your honors in
434 this honorable court to answer all and singular the premises
and perform and abide by such order and decree therein as to your honors shall seem meet and proper.

SAMUEL R. ALDEN,
Solicitor for Burgess and the Kamms.

Interrogatories for the examination of the defendant, George P. Bissell, in answer to the foregoing cross-bill.

1st. When did you personally first learn of the existance of the $10,000 bond of H. J. Rudisill to J. H. Barnett, deceased, and of the two mortgages—the one executed to J. H. and the other to A. G. Barnett by said H. J. Rudisill and wife, and dated, respectively, December 13th, 1871, and January 23rd, 1875?

2. Set forth the particulars of the authority by you or George P. Bissell & Co. conferred on your former agent, John Hough, resident in Fort Wayne. If his authority was written, produce it or a substantial copy.

3. Did you or George P. Bissell & Co. authorize any one to make an $8,000 loan in A. D. 1869 on the personal security of the brothers Burnett and H. J. Rudisill and real estate security to be given by J. H. Barnett in part and Henry J. Rudisill in part; if so, whom did you so authorize, and what were the terms in detail of such agents' authority and when given? If oral, please state in full; if written, please produce the written authority or a substantial copy.

435 The defendant, George P. Bissell, is required to answer the foregoing interrogatories.

S. R. ALDEN,
Solicitor for Burgess and the Kamms.

EXHIBIT "A"

Is the same as Exhibit "F" filed with the original bill of George P. Bissell, and will be found on page 33 of this transcript.

EXHIBIT "B"

Is the same as Exhibit "A" filed with the answer of Henry Burgess to the original bill, and will be found on page 145 of this transcript.

EXHIBIT "C"

Is the same as Exhibit "A A" filed with the amendment to the original bill of George P. Bissell, and will be found on page 51 of this transcript.

EXHIBIT "D"

Is the same as Exhibit "C" filed with the original bill of George P. Bissell, and will be found on page 29 of this transcript.

And said Abraham G. Barnett now files his answer to the cross-bill of Burgess and the Kamms in these words, to wit:

The separate answer of Abraham G. Barnett to the cross-bill of complaint of Henry Burgess, Hannah Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm.

This defendant, saving to himself all manner of exceptions to the errors and insufficiencies in said cross-complaint, for answer thereto says that he admits all the allegations contained in said cross-436 complaint concerning the filing of the bill, amended bill, and supplemental bill of complaint by said Bissell and the facts therein averred, but he denies that said George P. Bissell made said loan of said $8,000 to said John H. Barnett, or to him and this defendant, but that $5,000 thereof was loaned by said Bissell to said Henry Rudisill upon the agreement that he should repay the same to said George P. Bissell and all interest thereon, and upon the agreement that he should give the bond and mortgage set out to said John H. Barnett to secure such repayment to said Bissell, as in said Bissell's bill set forth.

And, answering further, he says that said $10,000 bond and the mortgage to said J. H. Barnett to secure the same were prepared by the agent of said George P. Bissell, duly authorized by him to act in the premises, to better secure the said loan and to bind said Rudisill to pay the portion thereof he received. And he denies that said bond and mortgage were executed to said J. H. Barnett without consideration, but were so executed upon the consideration aforesaid. He admits that said J. H. Barnett died, as averred in said cross-complaint, testate, and nominated this defendant as his executor, and that said will was duly probated, and that this defendant did not take out letters testamentary on said will or give

437 bond or qualify as such executor, but that he did collect a
very few small debts due to the deceased and an amount of
rent from his real estate and did pay the same out for a few debts
he owed and in removing their parents to the new cemetery, but
that the whole sum so collected and paid out would not amount to
over $1,200, or about that sum.

And he further says that there never was any consultation between
him and his codefendants or any of them over said will until long
after said collections and disbursements were made, and that the
said Susan B. Shoaff and Mary Wall did not know, so far as he
knows or believes, but that he had at the time been regularly ap-
pointed as the executor of said estate and qualified and given bond
as such; that said decedent was the brother of this defendant and
on very intimate relations with him in his lifetime, but they neither
had any joint interest in any of their property or business nor were
they in partnership in any business whatever; and he admits that
he believed his nomination in said will as executor of his brother
made him such, and he proceeded to do in that matter what he did
do by the consent or authority of no one, but upon his own motion,
believing he had the authority to so do, and in the same belief he
released said mortgage to said J. H. Barnett as to part of the
438 premises therein described and took another mortgage on said
mill property in his own name as such executor; and, as this
honorable court has in the interlocutory decree herein rendered de-
creed that said release is binding as to this defendant and as to his
right to have said mortgaged property sold to pay said Rudisill's
portion of said Bissell debt and thereby protect his contingent inter-
est in the property so mortgaged by his brother to secure said $8,000
loan to said Bissell, this defendant says he has a right to a decree of
this court requiring said Bissell to sell the property so mortgaged
to this defendant by said substituted mortgage.

And answering further says that said bond and mortgage *was*
executed by said Rudisill and wife to his brother voluntarily and in
consum-ation of the agreement upon which said loan was made to
him and in consideration thereof, and that in taking the same and
preparing the papers the agent of said Bissell acted for said Bissell
and not for this defendant and his brother, or either of them, only
so far as they concurred in his acts in the premises, and their de-
sire also that the same should be secured as a protection to
them, as well as a security to said Bissell; and he expressly
denies that said consideration upon which he released said
mortgage to J. H. Barnett, as to part of the property, was the
439 purchase-money paid by Zollinger, Burgess, and Kamm, but
the only consideration this defendant got for said release was
the substituted security so executed to him by Rudisill and wife on
the mill property; that at the time he took said mortgage on the
mill property he had no knowledge whatever of the mortgage in
favor of said Elizabeth Rudisill thereon, but was told by said Rudi-
sill that it was wholly free from incumbrance, and that his said
mortgage would be a first lien thereon, and in the faith of such rep-
resentations he accepted said mortgage in lieu of said mortgage to

his brother, so far as he could do so. And if by any means this honorable court should reach the conclusion that the said mortgage to J. H. Barnett should be foreclosed to pay the said annuity mortgage, then this defendant insists that the mortgage so executed to him should be foreclosed by the decree of this court to pay the said sum of $5,000, with interest, costs, and expenses accrued and to accrue thereon, so borrowed by said Rudisill to protect and save his contingent interest in the property covered by the mortgage so executed by said J. H. Barnett to said Bissell, the said will devising to him the contingent remainder in fee in and to all the property so covered by said mortgage.

All of which matters and things this defendant is ready and
440 willing to aver and prove as this court may direct, and hence
he prays to be dismissed with his reasonable costs and expenses in this behalf expended.

A. G. BARNETT.

NINDE & ELLISON,
Solicitors.

Subscribed and sworn to before me.

NOBLE C. BUTLER, *Clerk.*

And said Watson and Mary Wall and John A. and Susan B. Shoaff now file their answer to the cross-bill of Burgess and the Kamms in these words, to wit:

The joint and several answer of John A. Shoaff and Susan B. Shoaff, his wife, and Watson Wall and May A. Wall, his wife, and Byron Hueston Barnett and James William Barnett, by their guardian *ad litem*, L. M. Ninde, of the defendants, to the cross-complaint of Henry Burgess, Hannah Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm.

And these defendants, now and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said cross-bill contained, for answer thereunto, or to so much thereof or such parts thereof as they are advised is necessary for them to answer unto, *they* answer and say that they admit all the allegations in
said cross-complaint contained, so far as the same avers
441 the filing of the bill, amended and supplemental bill by said
George P. Bissell, and the allegations therein contained; but these defendants deny that said George P. Bissell made said loan to said Barnetts alone, but they aver that the said loan was made to said John H. Barnett and Henry J. Rudisill in the proportion of $5,000 to said Rudisill and $3,000 to said John H. Barnett, and that said loan was made upon the said bonds and trust deed of said Barnetts and also upon the said bond for $10,000 and the mortgage to secure the same to said Rudisill; and they say that said Rudisill got $5,000 of said loaned money, and said John H. Barnett $3,000 only thereof; and they further say that said bond and mortgage so

executed by said Henry J. Rudisill to J. H. Barnett were prepared by the duly authorized agent of said Bissell and executed in fulfillment of the arrangement made with Bissell's said agent, being then and there duly authorized to act in that behalf by said Bissell to all of which said Bissell was a party as aforesaid; and these defendants deny that said Rudisill executed said $10,000 bond to J. H. Barnett, deceased, without any consideration; and they deny that the mortgage to secure the same was executed without any consideration, but they say that they are informed, and believe such information true, that said Rudisill received $5,000 of 442 said loan, and that said bond and mortgage were given in good faith to secure the repayment of the same, and that said bond and mortgage *was* not obtained improperly, but were executed voluntarily upon the consideration aforesaid, but they admit that the description of the property therein contained, as set forth in said cross-complaint, is correct, and that the condition is also correctly set forth therein.

They admit that said John H. Barnett died at said A. G. Barnett's residence, and that he left a will, and that the same was duly probated, but they deny that the same was read over and a consultation ever had over its contents by these defendants, or either of them, with said A. G. Barnett, or that he entered upon the trusts of said will or the administration of said estate by the consent or upon any agreement or concurrence of or with these defendants.

And they say that said A. G. Barnett never took out letters testamentary or gave bond or qualified as executor of said will, and never had any right or authority to act as such executor or to meddle in any manner whatever with said estate from these defendants, but they say that all he did was done without their consent, and most of what he did was done by him without their knowledge until after it was done; and they say they are informed by counsel, 443 and believe such information true, that the nomination of said A. G. Barnett as executor by said J. H. Barnett in his will gave him no power or authority whatever to act as such, and that all his acts as such were void; and these defendants say that said John H. Barnett and A. G. Barnett were friendly in his lifetime, but were not partners in any sense whatever in any of their business transactions.

And they admit that said Henry J. Rudisill did sell to Burgess, Zollinger, and Kamm the premises set forth in said cross-complaint, and that said deed was recorded, as aver-ed, and is correctly exhibited, but what he, the said Rudisill, did with the said purchase-money these defendants have no knowledge whatever.

And, answering further, they say that they are informed and believe said information true that said A. G. Barnett did execute some attempted release of said mortgage to John H. Barnett; but they aver that such release was wholly without authority and void so far as these defendants are concerned; that they did not, nor did either of them, ever know of the execution of such release until after this suit was brought; but they believe that said Rudisill knew that said A. G. Barnett had never qualified as executor of said estate

and had no right to act as such, and that said Burgess, Zollinger, and Kamm, by the exercise of any reasonable degree of care,
444 could also have known the same thing, and that their failure to ascertain that said A. G. Barnett had not taken out letters of administration was the result of gross carelessness on their part.

And they, further answering, say they have no knowledge, except by hearsay, about the said mortgage so executed by said H. J. Rudisill and wife to said A. G. Barnett upon said mill property, nor have they any knowledge, except in the same way, of the said annuity mortgage, or the value of said mill property or the liens thereon; that they have never accepted such mortgage to said A. G. Barnett, or ratified or confirmed or authorized the taking thereof by him, and do not now claim any recovery thereon; but they do yet claim the security of said mortgage so executed to A. G. Barnett.

And they, further answering, say that they deny that said Elizabeth Rudisill executed said release of the portion of the premises so mortgaged to John H. Barnett, in consideration of the money so paid by Burgess, Zollinger, and Kamm, or that she received one cent of the money so paid by them therefor, but because she was fully and entirely satisfied with the security the remaining portion of her mortgaged premises gave her for her said annuity; and these defendants aver and say that she, by said release, absolutely released said premises at a time when H. J. Rudisill was solvent,
445 and had other property out of which the sum due upon his $10,000 could have been collected if the premises so mortgaged to said J. H. Barnett had failed to produce the same, and upon such release of the said annuity mortgage being so made, and the said H. J. Rudisill having since become insolvent, these defendants have and have been thus compelled to rely wholly upon their said mortgage- premises for their protection and the protection of their property from said mortgage to the complainant, George P. Bisseli.

And these defendants, further answering, say that they admit that the pieces of the land described in said cross complaint as covered by the mortgage to John H. Barnett and not covered by the deed to Burgess, Zollinger, and Kamm are correctly described in said cross-complaint; and they have no objection to the same being sold prior to the sale of the balance of the premises so mortgaged to said J. H. Barnett to make said debt so secured to him by said $10,000 bond.

And these defendants, further answering, say that the agent of George P. Bissell, or of Bissell & Co., that negotiated the $8,000 loan to said Barnetts and Rudisill did act as the agent of said Bissell in loaning part, to wit, $5,000, of said money to said Rudisill, and took said bond for $10,000 from him to said J. H. Bar-
446 nett, but he did not act in that matter as the agent of said Barnett, deceased, or his brother, A. G. Barnett, but to secure said bond and mortgage for the benefit of said Bissell and to increase his security for said loan; but these defendants deny that said Bissell's said agent ever was consulted about the substitution of said mortgage on the mill property for the said mortgage to John H.

Barnett, or ever consented thereto, or that said agent ever consented to the release of said last-named mortgage.

And these defendants further deny that said A. G. Barnett ever assumed to take possession, manage, or control the estate of said John H. Barnett, as set forth in said cross-complaint; that he never collected thousands of dollars of debts due the same, nor any other amount of such debts, to the knowledge of these defendants; that all he ever did, so far as they ever knew, was to collect a small amount of rents accruing on the real estate and pay a small amount of funeral expenses and the expense of removing his parents to the new cemetery; that the whole amount of money so collected and paid out was not over $200 or $300, or less than $1,000, as they believe, and they say that at the time he was so acting he claimed to do so as a lawfully authorized executor, authorized in the ordinary way to so act, and they never knew to the contrary until this 447 suit was brought; that he always represented to these defendants that he was acting under authority of the court having jurisdiction of estates in such cases.

And these defendants aver that all the questions set forth or arising upon said cross-complaint have been and were fully considered and passed upon by this court and settled by its interlocutory decree heretofore rendered in this cause, and they ask the same to be carried out in the final decree to be herein rendered.

All which matters and things these defendants are ready to aver and prove as this court may direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf expended.

JOHN A. SHOAFF.
SUSAN R. SHOAFF.
BYRON HUSTON BARNETT,
JAMES WILLIAM BARNETT,
By L. M. NINDE, *Guard. ad Litem.*

NINDE & ELLISON,
Solicitors of these Def'ts.

Subscribed and sworn to before me this 21st day of June, 1881.
[NOTARIAL SEAL.] ELIJAH BARTON,
Notary Public.

And the complainant, George P. Bissell, now files his answer to the cross-complaint of Burgess and the Kamms in these words, to wit:

The separate answer of George P. Bissell, one of the defendants, to the cross-bill exhibited against him and others by Henry 448 Burgess and others, defendants to the original bill of the said George P. Bissell.

This defendant, for answer to so much and such parts of said cross-bill as he is advised that it is necessary or material for him to make answer unto, says he admits said cross-bill to be true so far as it alleges and sets forth matters contained in his original bill in this case, but he expressly denies that John Hough, who negotiated the said loan of $8,000 in said cross-bill mentioned, was ever consulted by said Henry J. Rudisill about the release of said mortgage by A. G. Barnett and the substitution of said mortgage on the St. Joe mill property executed to said A. G. Barnett, or that he ever consented to said release and the execution of said mortgage in substitution for the lien so released, as charged in said cross-bill, and that he, the said John Hough, had no authority from this defendant or the said George P. Bissell & Co. to consent to the release of the said mortgage, or any other security to which this defendant was entitled as security for said loan of eight thousand dollars to said Barnetts.

And as to all the rest and residue of said bill this defendant is an entire stranger, and therefore cannot admit or deny the same.

COOMBS, BELL & MORRIS,
Solicitors for Bissell.

449 And the said Burgess and the Kamms now file their replication to the answers of Barnett, Walls, Shoaffs, and the plaintiff to their cross-bill in these words, to wit:

In the Circuit Court of the United States for the District of Indiana.

The replication of Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, George L. Kamm, and Charles Kamm, Henry Kamm, Anna Kamm, and Nellie Kamm, by their guardian *ad litem* and next friend, Samuel R. Alden, to the answers of George P. Bissell, Watson Wall, Mary A. Wall, John A. Shoaff, Susan Shoaff, Byron Huston Barnett, James William Barnett, and Abraham G. Barnett, eight of the defendants to their cross-bill of complaint.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said several answers, for replication thereunto sayeth that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered to, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied to by these repliants, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in their said cross-bill they have already prayed.

S. R. ALDEN,
Solicitor for Cross-complainants.

450 And the said infant defendants, Byron Huston Barnett and James William Barnett, by Lindley M. Ninde, their guardian *ad litem*, now file their answer to all said cross-complaints in these words, to wit:

The answer of Byron Huston Barnett and James William Barnett, by L. M. Ninde, their guardian *ad litem* and next friend, interpleaded with others at the suit of Oscar A. Simons and John H. Bass, in their cross-complaint filed in the case of George P. Bissell *vs.* A. G. Barnett *et al.;* and also the answer of said minors by their said guardian to the cross-complaint of said John H. Bass, Oscar A. Simons, Alfred Hattersley, and others, filed against them and others in the same case; and also the answer of said minors by their said guardian *ad litem* to the cross-complaint of Henry Burgess, Hannah Kamm, and others, filed against them and others in said cause.

The said defendants, by their said guardian *ad litem*, say that they are ignorant of most of the matters stated in said cross-complaint, and they ask the court to require full proof of all the material facts stated in said cross-complaint unfavorable to their interests, and that the court will in all things protect their interests in the said cause the same as if all proper averments were made by them in defence of said cross-bills.

Wherefore they ask to be dismissed from said cross-complaints and the matters and things therein set forth, with their reasonable costs. 451

BYRON HUSTON BARNETT.
JAMES WILLIAM BARNETT.
By L. M. NINDE,
Their Guardian and Next Friend.

And the said defendants, Walls, Shoaffs, and said infant defendants, Byron H. and James W. Barnett, now file their replication in these words, to wit:

The replication of Watson Wall, Mary A. Wall, John A. Shoaff, Susan B. Shoaff, Byron Huston Barnett, and James William Barnett, by their guardian *ad litem* and next friend, to the several answers of John H. Bass, Oscar A. Simons, Alfred Hattersley, Andrew Hoffmeister, Henry Burgess, Mary J. McCurdy, and the widow and heirs of J. J. Kamm, deceased, to the several cross-bills of these repliants filed in the case of George P. Bissell *vs.* A. G. Barnett *et al.*, this replication to be for the benefit of said plaintiff, George P. Bissell.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answers of said defendants, for replication thereunto say that they do and will aver, maintain, and prove their said several cross-bills to be true, certain, and sufficient in law to be answered unto by said defendants thereto, and that the answers of said defendants thereto *is* very uncertain, evasive, and insufficient in law to be replied 452 unto by these repliants, without th*at*, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all of which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and they humbly pray as in and by their cross-bills they have already prayed.

NINDE & ELLISON,
Solicitors.

And the said defendants, Burgess and the Kamms, now file their specific objections to the interlocutory decree of February 10th, 1881, in these words, to wit:

Exceptions of Henry Burgess, Hannah Kamm, Andrew J. Kamm, George L. Kamm, and Charles Kamm, Harry Kamm, Anna Kamm, and Nellie Kamm, infants, by S. R. Alden, their guardian *ad litem*, eight of the defendants to the interlocutory decree herein made on the 10th day of February, 1881.

Said defendants, reserving to themselves all manner of benefit or advantage of exception or otherwise that can or may be urged to the many errors, uncertainties, insufficiencies, and imperfections of said decree, make specifically the following objections thereto, to wit:

1st. That the same does not contain findings upon all the material facts in issue.

453 2nd. That, as to these defendants, the finding, "that the equity is with the complainant and the defendants Barnetts, Walls, and Shoaffs," is contrary to law and to the evidence, and not sustained by sufficient evidence.

3rd. That the following findings of fact, viz., that H. J. Rudisill received five-eighths of the $8,000 loan made by G. P. Bissell & Co. to the brothers Barnett; that John H. Barnett, Abraham G. Barnett, and Henry J. Rudisill, on the 15th day of July, 1869, borrowed $8,000 of the complainant, and that J. H. Barnett died on the 23rd day of January, 1872, are severally not sustained by but are contrary to the evidence.

4th. That the following findings of law therein contained, to wit, that the mortgage of H. J. Rudisill and wife to J. H. Barnett, dated December 13th, 1871, remains in full force as against the property of these defendants, and that all the property therein described is primarily liable for five-eighths of said $8,000 loan, are contrary to the law and the evidence and not sustained by sufficient evidence.

5th. That the declaring a lien in favor of these defendants upon the remote contingent interest of A. G. Barnett in the property mortgaged by J. H. Barnett to George P. Bissell to secure said $8,000 loan is not proper relief upon the pleadings and evidence before the court.

And these defendants pray this honorable court to consider the foregoing specific objections to said interlocutory decree, and 454 to vacate or modify so much of said decree as upon further consideration and in view of the further facts presented at the final hearing may be deemed incorrect, improper, or inequitable.

S. R. ALDEN,
Solicitor for Defendants Burgess & Kamms.

And said cause, being fully at issue, is now here submitted to the court for final hearing upon said bill and the answers thereto, said several cross-bills and the answers thereto, with the replications, exhibits, [and] depositions of witnesses.

Thereupon depositions were read in evidence as follows, to wit:

Notice.

STATE OF INDIANA, } ss:
Allen County, }

In the Circuit Court of the United States in and for the District of Indiana. In Chancery.

GEORGE P. BISSELL, Trustee,
vs.
ABRAHAM G. BARNETT and Twenty-six Others.

To said complainant, George P. Bissell, and the codefendants of the undersigned:

You are hereby notified that on Monday, the 7th day of March, 1881, at the office of W. H. Withers, in Fort Wayne, county of Allen, and State of Indiana, between the hours of nine a. m. and six p. m. of said day, before some officer authorized to take depositions, the undersigned defendants will proceed to take the deposition- of sun-
dry witnesses on the part of said defendants, to be read in
455 evidence in the above-entitled cause, and, if necessary, will
continue the taking of the same from day to day between the hours and at the place aforesaid, or at such time and place as shall be fixed by the officer taking the same for the convenience of all parties, until the taking is completed.

Dated this 4th day of March, 1881.

HENRY BURGESS,
HANNAH C. KAMM,
ANDREW J. KAMM,
GEORGE L. KAMM,
CHARLES KAMM,
HENRY KAMM,
ANNA KAMM,
NELLIE KAMM,
By SAMUEL R. ALDEN,
Their Att'y & Solicitor.

Due service of the above notice is hereby acknowledged this 4th day of March, 1881.

COOMBS, MORRIS & BELL,
Solicitors for Complainant.
NINDE & ELLISON,
Solicitors for Defendants Barnetts, Shoaffs, & Walls—
Nine of Def'ts.
W. H. WITHERS,
Solicitor for Defendants Rudisills—Three of Def'ts.
TAYLOR & MORRIS,
Solicitors for Bass & Simons.

Depositions of Elizabeth Rudisill, Hannah C. Kamm, Abraham G. Barnett, Newton B. Freeman, and William H. Goshorn, witnesses produced and sworn before me, George D. Crane, a notary public within and for the county of Allen and State of Indiana, on the 7th day of March, 1881, pursuant to the enclosed notice.

These depositions were taken on the part of the defendants, Henry Burgess and the Kamms, in a certain action now pending in the circuit court of the United States for the district of Indiana,
456 wherein George P. Bissell, trustee, is complainant, and Abraham G. Barnett *et al.* are defendants.

At the request of, and to accommodate, the attorneys for the complainant, and by the consent of counsel for the several defendants, the taking of these depositions is adjourned until the 10th day of March, 1881.

March 7, 1881.

GEO. D. CRANE,
Notary Public.

And now, on this 10th day of March, 1881, the taking of these depositions is proceeded with pursuant to adjournment.

The said ELIZABETH RUDISILL, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 1. Please state your name, residence, and relationship to Henry J. Rudisill.

A. My name is Elizabeth Rudisill; reside in Washington township, Allen county, Indiana, and Henry J. Rudisill is my son.

Q. 2. Are you the Elizabeth Rudisill, made a party to this suit, who held a mortgage on the St. Joe mill property and other real estate executed by your son, Henry J. Rudisill, and his wife, to secure to you an annuity of $800, and who sold and assigned the same to Oscar A. Simons and John H. Bass?

A. I am.

Q. 3. What consideration did you give to your son for this mortgage?

A. I gave him a deed for all the land covered by it.

457 Q. 4. Did you know Henry Burgess, Charles A. Zollinger, and J. J. Kamm in 1874?

A. Yes, sir; I did.

Q. 5. Did you know of the purchase from your son, Henry J. Rudisill, in January, 1875, of the land now known as Burgess, Zollinger, & Kamm's addition to the city of Fort Wayne, and the tract between this addition and the feeder to the Wabash & Erie canal?

A. I knew of it at the time.

Q. 6. What is the fact as to whether or not you released to said purchasers your lien on those tracts of land?

A. Yes, sir; I did.

Q. 7. What knowledg-, if any, had you at that time of other mortgages than your own on the premises so released by you to Burgess, Zollinger, & Kamm?

A. I did not know there were any.

Q. 8. What consideration, if any, did you receive from Henry J. Rudisill for that release?

A. He did not give me anything. I only released the mortgage to him, and I knew he was going to sell the land.

Q. 9. Did you know of any other mortgages on any of the property covered by your mortgage?

A. No, sir; I did not. I didn't know of any mortgage except my own.

Cross-examination by L. M. NINDE, Esq.:

Q. 10. Did you know of the execution by your son Henry and his wife of a mortgage to John H. Barnett in his lifetime?

458 A. No, sir; I didn't. I didn't know of their having any dealings; I didn't know that he ever had any dealings with the Barnetts.

Q. 11. Do you not recollect of releasing the property sold to Burgess, Zollinger, & Kamm from your annuity mortgage some years before said sale was made?

A. I never made but two releases of my mortgage; one was for the property west of the feeder mortgaged to Bissell, and the other when he sold to Burgess, Zollinger, & Kamm, described above.

Q. 12. What was the date of your release of the property west of the feeder?

A. I could not tell that, for I don't know.

Q. 13. When you released the property sold to Burgess, Zollinger, & Kamm was it not your intention to rely wholly upon the mill property as security for your annuity mortgage?

A. Yes, sir; I guess it was.

Q. 14. Did not your annuity mortgage cover yet other property than the mill property?

A. No, sir; I think not.

Q. 15. Have you the means for making an accurate statement of the amount of annuities unpaid to you at the time you sold the annuity mortgage to Bass & Simons?

A. I could not do that. Mr. Withers had the business to attend to for me. I was sick at the time.

Q. 16. Please state your age and the condition of your health and constitution.

A. I was seventy-five on November 25th, 1880. I have al-
459 ways had good health; never had but very little sickness.

Q. 17. Please look into the state of the accounts between you and your son Henry in reference to the claim due you upon the annuity mortgage, and, after deducting all payments on account of said annuity indebtedness made by your son Henry to you, or made by any other person to you, especially considering all payments made by Mr. Hill thereon, state the amount due to you on said mortgage on account of past installments due to you thereon at the time you sold to Bass and Simons.

A. There was due me at the time of the sale of my mortgage to Bass & Simons from my son my annuity from July 1, 1875. No payment thereon had been made by Hill or any other person. The amount due me at the date of the sale of my mortgage to Bass & Simons was $3,608, and that amount they paid me for it. The installment du*ly* July 1, 1875, was unpaid, and nothing has been paid by my son since. The sale of the mortgage was made by me to Bass & Simons October 29, 1879. The unpaid installments, with interest on each to that date, made up the amount.

Re-examination by S. R. ALDEN, Esq.:

Q. 18. Mr. Ninde has asked you, question 13, whether it was not
your intention, at the time you released the property sold to Burgess,
Zollinger, & Kamm, to rely wholly upon the mill property.
460 You may state just what your intention was in releasing
to Burgess, Zollinger, & Kamm.

A. I released it to give them whatever right I had in that land, and so that Henry could sell.

ELIZABETH RUDISILL.

And the said HANNAH C. KAMM, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 19. State your name, age, residence, and relation to your codefendants Kamm.

A. My name is Hannah C. Kamm; age, 44 years; reside in Fort Wayne, and am the mother of all the other defendants of the name of Kamm.

Q. 20. Which of your said children are minors, and what are their ages?

A. Charles, age 17 years; Harry, age 14 years; Anna, age 10 years; Nellie, age 7 years.

Q. 21. Has your deceased husband's estate been settled; and, if not, who is the legally qualified representative of it?

A. It has not. I am the administratrix of his estate.

Q. 22. Is said estate solvent or insolvent?

A. It is insolvent, I think.

Q. 23. What, if any, means have you or your children to redeem any of the property of the said estate, if the same were sold?

A. None whatever.

Q. 24. What part of the property your husband bought
461 with Henry Burgess and Charles A. Zollinger of Henry J.
Rudisill in January, 1875, still belongs to the estate?

A. Lots 12 & 14, and the undivided one-half of lots 32, 33, 34, 35, 36, & 37 in Burgess, Zollinger, & Kamm's addition to the city of Fort Wayne, and one undivided fourth of the tract lying between said addition and the feeder to the Wabash & Erie canal.

Q. 25. Did your husband ever sell any of the lots in said addition prior to his death?

A. He sold some, I believe.

Q. 26. Did he give warranty deeds for those he sold?

A. He did for all he sold.

HANNAH KAMM.

The further taking of these depositions is now adjourned to the 11th day of March, 1881.

GEO. D. CRANE,
Notary Public.

And now, on this 11th day of March, 1881, the further taking of these depositions is adjourned until the 12th day of March, 1881, in consequence of the non-attendance of witnesses and by agreement of counsel.

GEO. D. CRANE,
Notary Public.

And now, on this 12th day of March, 1881, the further taking of these depositions is adjourned to Monday, the 14th day of March, 1881, by agreement of counsel and to accommodate witness.

GEO. D. CRANE,
Notary Public.

And now, on this 14th day of March, 1881, the further taking of these depositions is adjourned, by agreement, to the 21st day of March, 1881.

GEO. D. CRANE,
Notary Public.

462 And now, on this 21st day of March, 1881, the further taking of these depositions is proceeded with, as follows:

The said ABRAHAM G. BARNETT, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 27. Are you the defendant Abraham G. Barnett in this case? If so, state your age and the age of your sons, Byron Huston and James William Barnett.

A. I am said defendant; Byron Huston is, I think, 14 years old, and James William Barnett 12 years old; I am 48 years old.

Q. 28. What is the age of your sisters, Mary Wall and Susan Shoaff?

A. Mary Wall is about 50 years old, and Susan Shoaff about 40 years old.

Q. 29. A summons hereto attached, marked "No. 1" for identification, is shown the witness and he is asked: Did you produce the books of the paper-mill firm as demanded by this summons?

A. No, sir.

Q. 30. Will you produce them?

A. I cannot find all of them. The books that I have are of date later than the time of the formation of the partnership of Freeman & Barnett. In the old books, which are lost, there was no account with Henry J. Rudisill. The books I have are books of the partnership of Freeman & Barnett, and have no relation to the 463 business of Freeman, Bard & Barnett. They contain no account with Henry J. Rudisill, except an item of borrowed money, which has never been fully repaid by Rudisill, there being $30 or $40 still due. These books, I am advised by counsel, are immaterial to the controversy, and that I am under no obligation to produce them. I am further advised they are my private property, and I am under no obligation to produce them, and therefore decline to produce them unless ordered by the court—that is, Judge Gresham.

Q. 31. When you went into this paper-mill business as partner, whom did you buy out and what did you pay?

A. I did not buy out anybody; it was Freeman & Bard then; I was to pay and did pay $10,000 for an undivided one-third interest.

Q. 32. To whom did you pay this $10,000?

A. That is hard to tell; I think about $3,000 went into bank to the credit of the firm. I traded some property to creditors of the firm; gave my notes to other creditors; did not pay all up for two or three years.

Q. 33. Whose interest in the paper mill did your brother, John H. Barnett, buy and what did he pay?

A. He bought out Bard's interest in the property; he paid $9,000.

Q. 34. Was that with money he borrowed?

A. No, sir.

Q. 35. When you filed your schedule in bankruptcy, did you include in your debts the Bissell loan—*i. e.*, the eight bonds 464 you executed to Bissell July 15, 1869, for $1,000 each?

A. No, sir.

Q. 36. Do you still, with your children, own that part of the homestead devised you by your brother, John H. Barnett?

A. My children do, but there are judgments against me which are liens on it.

Q. 37. When did you report to the court as executor or trustee of your brother John H. Barnett's estate.

A. Never.

Q. 38. In a letter to your sister, Mrs. Wall, in 1873, you spoke of making a report to the court. Why did you not do so? Was the estate settled by you among yourselves?

A. I can't answer that; I never done it. The estate has been laying there in court the same as it was.

The guardian *ad litem* of Byron Huston Barnett and James William Barnett objects to the foregoing answer in as far as it refers to proceedings in court as incompetent.

The witness answers further as follows:

I never went into any court in regard to the estate. Mr. J. W Dawson left the will in the clerk's office to be probated. I never took out any letters, and never done anything in the court-house or in the clerk's office, only to get Mr. Edsall to give me a copy of the will.

Q. 39. Did you have any settlement with your sisters?

A. No, sir.

465 Q. 40. Did you ever report to them anything as to what you had done in reference to the estate?

A. I don't think that I did—no; I know I didn't.

Q. 41. What did your brother, John H. Barnett, give Henry J. Rudisill for the $10,000 bond which you took to Messrs. Coombs, Morris & Bell about the time this suit was commenced?

A. He let him have the $5,000, less the cost of getting it.

Q. 42. Do you mean he gave Henry J. Rudisill any money?

A. I don't know whether he passed it over to him or whether it was paid in to the store of Freeman, Bard & Barnett or handed to Mr. Freeman. I do not now recollect.

Q. 43. What did you ever hear pass between your brother and H. J. Rudisill as to that bond? State fully any conversation.

A. My brother went and seen him himself. I was not present when he got the bond.

Q. 44. Did you hear any conversation as to this bond between your brother and Rudisill afterward?

A. Not that I recollect of.

Q. 45. Then the matter of this bond and its consideration was between your brother and Rudisill, was it?

A. It was understood, when we made the loan, among all of us that he was to give the bond; the same kind of a bond that we gave to Mr. Bissell to secure his part of the loan.

Q. 46. Was your brother's name or his estate concerned in 466 or made party to the bankruptcy proceedings of Freeman & Barnett?

A. No, sir.

The further taking of these depositions is now adjourned to the 22nd day of March, 1881.

GEO. D. CRANE,
Notary Public.

And now, on this 22nd day of March, 1881, the further taking of these depositions is proceeded with as follows:

Q. 47. Who were named as partners and part owners of the paper mill and business in the petition in bankruptcy of Freeman & Barnett?

A. Newton B. Freeman and A. G. Barnett.

Q. 48. Were they the only parties who owned an interest in the firm assets?

A. Yes, sir. J. H. Barnett owned an undivided one-third of the real estate on which the paper mill was situate, but had no interest in the firm of Freeman & Barnett or in their assets.

Q. 49. At the time you bought in who owned the paper mill and business?

A. Newton B. Freeman and Samuel Bard.

Q. 50. After John Hough refused to make a loan for Bissell, in 1869, on H. J. Rudisill's offered security were you present at any conversations between your brother and Rudisill as to the Bissell loan or its proceeds?

A. I do not recollect whether I was or was not.

Q. 51. Did you ever hear Rudisill say in your brother's presence what he got or was to get for the bond he gave your brother?

A. I do not recollect having ever heard either of them say anything about it in the other's presence after the loan was made.

467 Q. 52. Between the time Hough refused to put Rudisill's name in the application for a loan and the time when you and your brother received the draft from Bissell were you present at any conversations between your brother and Rudisill?

A. I don't recollect of any.

Q. 53. Did you at or before the time of such refusal by Hough hear either your brother or Rudisill say in the presence of the other what your brother was to give Rudisill for Rudisill's obligation to your brother?

A. I don't remember.

The witness here desires to correct his answer to question No. 30, and says that the account of Henry J. Rudisill with the firm of Freeman & Barnett was settled in full.

Q. 53. Did your brother ever receive any of the profits or assets of the paper mill and business after his purchase from Bard?

A. No, sir.

Q. 54. Did Rudisill ever receive any of the firm profits or assets?

A. Not that I know of.

Q. 55. Where did the $3,000 cash you speak of having paid in purchasing an interest in the paper mill and business come from?

A. From the sale of a piece of real estate.

Q. 56. Did you come into the possession of the books and business papers and accounts of your brother at his decease?

A. Yes.

Q. 57. Have you those books, papers, &c., still?

468 A. He had no account-books. He had nothing but a small amount of money in Hamilton's bank, and I think there was a sum of money due him from J. W. Dawson and a small amount due from a tenant in his house and some title papers. He had paid most of his debts before his death. My brother, J. H. Barnett, lived with me, and we had everything in common, excepting the paper mill. When he worked at the mill he was paid for his labor, same as any other employé. We made no charges or accounts with or against each other.

Q. 58. Had N. B. Freeman any account with the firm or you or your brother?

A. Had an account with the firm; not with myself or my brother.

Q. 59. Was the firm largely indebted to Freeman at the time the business was closed?

A. No.

Q. 60. Was Freeman largely indebted to the firm at that time?

A. He had drawn out his living. His account showed probably some $5,000 or $6,000 drawn out by him during the continuance of the partnership. He had, however, no credit on his account for his services.

Q. 61. How was your account with the firm?

A. I think the account showed the firm owed me some.

A. G. BARNETT.

The further taking of these depositions is now adjourned until the 19th day of April, 1881.

GEO. D. CRANE,
Notary Public.

469 And now, on this 19th day of April, 1881, the further taking of these depositions is proceeded with as follows:

The said NEWTON B. FREEMAN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 62. You are the Newton B. Freeman who was a partner of John H. and Abraham G. Barnett in the paper mill and business carried on in the name of Freeman & Barnett and who testified heretofore in this cause, are you not?

The defendant, A. G. Barnett, enters an objection to this question because of the assumption that J. H. Barnett was a partner.

A. I cannot say I was a partner of J. H. Barnett; otherwise, yes.

Q. 63. State, if you know, what balance your account with the firm of Freeman & Barnett showed in favor of or against the firm, as the case may be, at the time the firm went into bankruptcy.

A. I don't know.

Q. 64. Have you any means of ascertaining?

A. I don't know that I have.

Q. 65. Were you present at any negotiations for a loan of $8,000, between the Barnett brothers, Henry J. Rudisill, and John Hough, in July, 1869?

A. No; I was not.

Q. 66. Are you aware of Henry J. Rudisill's having given John H. Barnett a bond in the penal sum of $10,000 to secure $5,000 of a loan made by George P. Bissell & Co. to the Barnett brothers? 470

A. I don't know of any bond being given; I heard of a mortgage being given.

Q. 67. By whom, when, and to whom?

A. I cannot answer that. I heard that H. J. Rudisill gave a mortgage to one of the Barnetts—I don't know which and I do not know the time.

Q. 68. Can and will you produce the books of Freeman & Barnett?

A. I cannot.

Q. 69. Were you familiar with the Barnett brothers' way of conducting their business affairs?

A. I was not familiar with any business between them—that is, the two brothers had between themselves. J. H. Barnett didn't transact any business at the office of the mill.

Q. 70. Do you know about what the debit side of your account with the firm footed up from July 1, 1869, to the time when the firm ceased business? If so, state it.

A. During the partnership I don't know exactly, but it may have been $5,000 or $6,000.

Q. 71. Were there any items put on the books during that period to your credit; if so, how much was the total credit?

A, There was credits, I think, of about $5,000.

Q. 72. Were you present at any conversations between John H. Barnett and Henry J. Rudisill touching the $8,000 Bissell loan or any part of it?

A. No; I was not.

Q. 73. Do you know how A. G. Barnett's account with the firm stood at the time your petition in bankruptcy was filed?

471 A. I think his account was about the same as my account. I think I had drawn out about $500 to $600 more than he had.

Cross-examination by L. M. NINDE, Esq.:

Q. 74. You may state whether the $5,000 credit you speak of was the $5,000 furnished by H. J. Rudisill.

Counsel for Burgess and the Kamms object to the question as to its form and substance as incompetent and impertinent and for that it assumes that $5,000 had been furnished by H. J. Rudisill contrary to the testimony of witness heretofore given and contrary to the fact.

A. It was.

Re-examination by S. R. ALDEN, Esq.:

Q. 75. Is this the $5,000 that you testified on your former examinatio in this cause was placed to your credit on the firm books and that Henry J. Rudisill went your security for?

A. It is the same, if I so testified.

Q. 76. Do you mean it to be inferred that Rudisill ever had this $5,000?

A. I don't know whether he ever had this money in his possession or not.

Q. 77. You did not get it from him, did you?

A. Not directly.

Q. 78. From whom did it directly come?

A. A. G. Barnett.

Q. 79. Do you know of your own personal knowledge whether

Rudisill ever had anything to do with this $5,000, or is your knowledge as to this matter from what you heard?

A. It is from what I heard.

472 Q. 80. In all of the business transactions of the Barnett brothers who was the active managers?

A. A. G. Barnett.

Q. 81. Did you ever hear Rudisill or J. H. Barnett, in the other's presence, say anything about the Bissell loan, or any part of it?

A. No, I did not.

Recross-examination by L. M. NINDE, Esq.:

Q. 82. Did not Henry J. Rudisill make an arrangement with you to obtain the sum of $5,000 to aid you in your paper-mill business?

Counsel for Burgess and the Kamms objects to the question as not a proper question on cross-examination and as incompetent.

A. Yes.

Q. 83. And did not you receive the said $5,000 through the hands of A. G. Barnett, and was it not credited to you on the books of Freeman & Barnett?

A. Yes.

Q. 84. Did you ever make any agreement with J. H. Barnett to repay said money to him, or was not your arrangement with reference to it wholly with Rudisill?

Counsel for Burgess and the Kamms objects to the question in form and substance and as incompetent, irrelevant, and impertinant and as improper on recross-examination.

A. The arrangement was made wholly with Rudisill.

Redirect examination by S. R. ALDEN, Esq.:

Q. 85. State fully the time, place, and substance of the conversations between you and Rudisill at which and by which an arrangement was made as to said $5,000.

473 A. I cannot do it; it was talked about several times, perhaps, at my house or on the road; I cannot recollect; I cannot give any details of the conversations.

Q. 86. Can you tell anything Rudisill said; if so, what did he say?

A. I don't remember.

Q. 87. How was this $5,000 to be paid?

A. I don't think there was anything said about that; we expected to make it before it came due.

Q. 88. Who expected to make it?

A. The firm—that is, I expected to make it through the firm.

Q. 89. Do you mean that it was understood among all of you that your share in the firm should pay all of this $5,000?

A. That was my understanding; there was no agreement among the parties.

Q. 90. Was there any agreement about the matter between you and any one?

A. I think not.

Q. 91. What, if you know, was this $8,000 Bissell loan made for, and where was the money needed?

A. It was made for the use of the firm of Freeman & Barnett, and was needed by A. G. Barnett and the firm.

Q. 92. Had Henry J. Rudisill ever any share in the firm assets of Freeman & Barnett?

A. No.

Q. 93. Did Henry J. Rudisill ever get anything for making the mortgage you spoke of to J. H. Barnett?

474 A. No; not that I know of.

N. B. FREEMAN.

The further taking of these depositions is, by agreement, adjourned until the 16th day of June, 1881.

GEO. D. CRANE, *Notary*.

And now, on this 16th day of June, 1881, the further taking of these depositions is proceeded with as follows:

The said WILLIAM H. GOSHORN, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by S. R. ALDEN, Esq.:

Q. 94. State your name, residence, and occupation.

A. My name is William H. Goshorn; residence, Fort Wayne, Indiana; I am, and have been for the past twelve years, surveyor of Allen county, Indiana.

Q. 95. The mortgage, dated January 23rd, 1875, executed by Henry J. Rudisill and wife to Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased, and heretofore introduced in evidence in this cause, is shown the witness, and he is asked as follows: Examine the description in said mortgage, which is in the following words and figures: "Situate in Allen county, Indiana. All that tract of land known as the St. Joe mill property, in section 35, township 31 north, of range 12 east, commencing at a point where the west bank of the St. Joe river intersects the north line of Wells' preemption; thence with the center of the St. Joe road northerly to a point where the St. Joe turnpike intersects the same; thence 475 easterly along the center of said turnpike to the west quarter-post of section 36, in said township and range; thence southeasterly with the eastern boundary of said mill-site to the bank of [the] St. Joe river; thence westerly with said river to the place of beginning, containing 15 acres, more or less," and give, if within your knowledge, the exact eastern boundary of said St. Joe mill property from the west quarter-post of said section thirty-six to the St. Joseph's river.

A. The exact description of said eastern boundary of said St. Joe mill property, between the west quarter-post of section thirty-six in township 31 north, of range 12 east, of the 2nd principal meridian, and the St. Joseph river, is as follows: Commencing at said quarter-post, thence south 4¼ degrees east, three chains and 46 links; thence south 19¼ degrees east, six chains and 10 links; thence south 61.44 degrees east, eleven chains and 50 links; thence south 16 degrees west, one chain and 45 links, to the St. Joseph river. The foregoing courses are magnetic. The variation of the magnetic needle at this point is 4¼ degrees east.

Q. 96. How many acres in said section 36 are included in the description in said mortgage lying north and east of said St. Joseph river?

A. Five & $\frac{47}{100}$ acres.

Q. 97. How much land does the following description include, viz:

A piece of land in section 35, township 31 north, of range 12
476 east, of the second principal meridian, bounded on the south
and west by Burgess, Zollinger, & Kamm's addition to the
city of Fort Wayne, on the north by the projected north line of said
addition, and on the east by the St. Joseph's road?

A. About one-third of an acre.

Q. 98. What is the comparative value of the land alone above described as compared with the average value of an equal amount in said Burgess, Zollinger, & Kamm's addition?

A. I think the above-mentioned price is double in value the same amount of said addition.

Q. 99. How much land, if you know, is included in the following description? A piece of land in said section thirty-five bounded on the west and north by said addition and on the south by the old Bloomingdale road.

A. About one-fourth of an acre.

Q. 100. Are you acquainted with the value of the 5.47 acres in said section 36, by you described as to its eastern boundary? If so, state the value per acre.

A. I am acquainted with its value, and consider it worth an average of three hundred dollars per acre.

W. H. GOSHORN.

Summons Referred to in Question No. 29, and Marked "No. 1" for Identification.

In the Circuit Court of the United States in and for the District of Indiana. In Chancery.

477 George P. Bissell *vs.* Abraham G. Barnett and Others.

To Abraham G. Barnett:

You are hereby summoned at the instance of your codefendants, Henry Burgess and the heirs of J. J. Kamm, deceased, and required personally to appear before me at the office of W. H. Withers, in the city of Fort Wayne, on the 11th day of March, 1881, at nine o'clock in the forenoon of said day, to be examined and give your testimony as a party before trial in the above-entitled action in behalf of your said codefendants therein, and to bring with you and then and there produce the ledgers and other books of the firm of

Freeman & Barnett containing all entries pertaining to the paper-mill business, &c., carried on by said firm or its predecessor at Fort Wayne from July 1st, 1869, to the dissolution of said firm.

Witness my hand and notarial seal this 10th day of March, 1881.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

STATE OF INDIANA,
Allen County, } *ss:*

I, George D. Crane, a notary public within and for said county
and State, hereby certify that the above-named Elizabeth Rudisill,
Hannah C. Kamm, Abraham G. Barnett, Newton B. Freeman, and
William H. Goshorn were by me first duly sworn according to law to
testify the truth, the whole truth, and nothing but the
478 truth relating to said cause; that their depositions were re-
duced to writing by me; that the said defendants, the Bar-
netts, Shoaffs, and Walls, attended, by Messrs. Ninde & Ellison, their
attorneys; the said defendants Bass and Simons attended, by Messrs.
Taylor & Morris, their attorneys; the said defendants Rudisills
attended, by W H. Withers, their attorney, and the complainant
was not present; and said depositions were taken at the office of W.
H. Withers and the office of S. R. Alden, in Fort Wayne, county of
Allen, and State of Indiana, between the hours of 9 a. m. and 6 p.
m. on the 7th day of March, 1881, and subsequent days, as shown
by adjourning orders therein noted.

In testimony whereof I have hereunto set my hand and notarial seal this 16th day of June, 1881.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

Notice.

In the Circuit Court of the United States for the District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* ABRAHAM G. BARNETT *et al.*

To said complainant and the defendants Shoaff, Barnett, Wall, Bass, and Simons:

You are hereby notified that on Saturday, the fourth day of June,
1881, at the residence of Henry J. Rudisill, at Riverside, in the
county of —— and State of California, between the hours of
479 8 a. m. and 6 p. m. of said day, before some officer authorized
to take depositions, the defendants Burgess and the Kamms
will proceed to take the deposition of Henry J. Rudisill, to be read
in evidence in the above-entitled cause, and, if necessary, will con-
tinue the taking of the same from day to day, between the hours
and at the place aforesaid, until the taking is completed.

Dated this 16th day of May, 1881.

Due service of the above notice is hereby acknowledged and dedimus waived this 17th day of May, 1881.

COOMBS, MORRIS & BELL,
Complainant's Solicitors.
NINDE & ELLISON,
Solicitors for Shoaffs, Barnetts, & Walls.
TAYLOR & MORRIS,
Solicitors for Bass & Simons.

Deposition of Henry J. Rudisill, a witness produced and sworn *to* before me, a notary public in and for San Bernardino county and State of California, at Riverside, on the fourth day of June, 1881, pursuant to the annexed notice.

This deposition was taken on the part of the defendants, Henry Burgess, Hanna Kamm, Andrew J. Kamm, George L. Kamm, Henry Kamm, Charles Kamm, Anna Kamm, and Nellie Kamm, known in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P.
480 Bissell, trustee, is plaintiff, and Abraham G. Barnett and twenty-six others [are] defendants.

The said plaintiff did not appear in person nor by attorney, nor did any of the defendants for whom this deposition was taken nor [any] of the remaining defendants appear in person or by attorney.

The said HENRY J. RUDISILL, of lawful age, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows, in answer to the following interrogatories forwarded with the annexed notice by said defendants in whose behalf this deposition is taken:

Interrogatory number one. State your name, residence, and the fact whether you are the defendant, Henry J. Rudisill, formerly living at Fort Wayne, Indiana, [and] now residing at Riverside, San Bernardino county, State of California.

Answer. I am the defendant in the above-named case. My name is Henry J. Rudisill.

Interrogatory No. 2. State the steps you took, if any, towards the making of a loan of Bissell prior to the receipts of the money by the Barnetts and the execution of the ten-thousand-dollar bond to J. H. Barnett by yourself.

Answer. In the spring of 1869 Messrs. J. H. & A. G. Barnett proposed that I should purchase an interest in the property known as the St. Joe paper-mills, located upon the St. Joseph river, about five miles north of Fort Wayne. I was informed by them that [by]
481 the purchase of the Bard interest in said property, then contemplated or already controlled by them, they would own five-sixths ($\frac{5}{6}$), estimating the property worth thirty thousand dollars ($30,000). The basis upon which the arrangement was to be made was as follows: J. H. Barnett to own one-third, ten thousand dollars ($10,000); A. G. Barnett to own one-third, ten thousand dollars ($10,000); N. B. Freeman to own one-sixth, five thousand dol-

lars ($5,000), and H. J. Rudisill to own one-sixth, five thousand dollars ($5,000). I was to take title from J. H. Barnett for my one-sixth interest, as it was stated he would be the principal owner in the concern by reason of the larger amount of money furnished by him. I informed them that I had not the money to invest in such an enterprize; that I had a loan from G. P. Bissell, covering all the land west of the Feeder canal, and that all the land owned by me east of the canal was covered by an annuity mortgage to my mother. Subsequent to these conversations Mr. J. H. Barnett proposed to include five thousand dollars ($5,000) in a loan he contemplated making from George P. Bissell, and I could secure him by a second mortgage upon a portion of my land east of the canal and adjoining my mill property. Upon consultation with Mr. John Hough, agent of G. P. Bissell, this plan was finally agreed upon, and he was authorized to prepare the necessary papers to 482 carry out the agreement in the event of J. H. Barnett getting the loan.

Interrogatory No. 3. State how you came to execute the ten thousand ($10,000) dollar bond dated July 15, 1869; what consideration you got or were to get for it; with whom you made the bargain; what led to your executing the bond; when you executed [the] bond; when you made the agreement that led to its execution, and what were the exact terms of such agreement. State whether you got any of the eight thousand dollars ($8,000), or anything else, for the execution of that bond, and whether John Hough knew all about the terms of the agreement under which you gave the bond, and what you got and did not get for it.

Answer. Some time, probably six weeks, after the loan was made to J. H. Barnett, Mr. John Hough called at the auditor's office in Fort Wayne, Indiana, with a bond for my signature, to carry out the provisions of the agreement with J. H. Barnett mentioned already. I objected to signing the bond without receiving the consideration mentioned, viz., one-sixth interest (1/6) in the paper mill. The money had all been paid to the Messrs. Barnett, and as yet I had no title to the portion to be assigned to me. He said the bond could be signed, but not placed upon record or delivered until all matters were completed, and that would no doubt be satisfactory to Mr. J. H. Barnett for the present, for he held both the money and the property. As Mr. Hough fully understood the nature of the arrangement 483 with Mr. J. H. Barnett, we having talked it over with him before the loan from Bissell, I signed the bond and he took it back to his office. My agreement was for one-sixth (1/6) interest in the St. Joe paper mill, and was specifically made with Mr. J. H. Barnett, estimating the fair value of the property at thirty thousand dollars ($30,000). I never have received one farthing of the money borrowed by him of George P. Bissell in the $8,000 mortgage, nor any title to the interest in said mill, nor any consideration whatever in any shape or form for the bond of ten thousand dollars ($10,000) referred to above.

Interrogatory No. four. State what let to the execution of the mortgage dated December 13th, 1871; when and on what conditions you first promised to execute a mortgage, and on what property you agreed to give a mortgage; whether you got anything for executing this mortgage; whether you knew at the time of its execution that this mortgage covered not the mill property, but land *been* the feeder and the mill property.

Answer. A mortgage was a part of the plan suggested by Mr. Hough, securing the obligation assumed by me in the bond and dependent upon the same conditions as the bond, viz., the transfer of one-sixth ($\frac{1}{6}$) interest in the paper mill to me by Mr. J. H. Barnett, but all matters connected with this transaction remained unsettled till the fall of 1871. Having been re-elected auditor of Allen
484 county, and being actively connected with the construction
of the Fort Wayne, Jackson & Saginaw railroad, I could not give the business my attention. I had, however, consulted with Mr. N. B. Freeman a number of times about assuming my obligations to Mr. J. H. Barnett and taking the interest that was to be assigned to me. This he agreed to do. Early in December, 1871, I was informed that Mr. J. H. Barnett, who was confined to the house by illness, wished to see me about the unsettled matter between us. I called, and in that interview, which was at his home, one mile north of Fort Wayne, Indiana, I arranged for the transfer of the one-sixth ($\frac{1}{6}$) interest in the paper mill to Mr. N. B. Freeman, agreeing to execute a mortgage upon the land between the canal feeder and the St. Joe mills. It was fully understood between us at that time that the lands lying between the St. Joe road and the canal feeder were the lands to be mortgaged, and were acceptable to him as sufficient security. I notified Mr. Hough, and, as I supposed, he made out the mortgage dated December 13th, 1871, in accordance with my directions. I signed it without critical examination, as did also Mrs. Rudisill, my wife, who did not appear personally before the notary to acknowledge it. I am satisfied from an examination of the description of the mortgage in a certified copy before me that the error was Mr. Hough's or Mr. Fisher's for the following reasons:
485 1st. I am so thoroughly familiar with the location of the
property that had I given a description for the notary to copy I would have either included the whole mill property or excluded it, and not have taken a portion, as the mortgage of Dec. 13, 1871, does.

2nd. I expected to sell a portion of my property east of the canal feeder, and had decided to sell that which was the most trouble to me, to wit, the mill, and therefore would not knowingly — encumbered it any more than I could help. I signed the mortgage, therefore, supposing it covered only the lands between the St. Joe road and the canal feeder. I think also that the mortgage used was prepared at the time the bond was drawn, but, not being signed and acknowledged until 1871, there would be a confusion in the recital in the body of the mortgage, and Mr. D. C. Fisher was not a notary in 1869; have had no consideration for the execution of the mortgage unless Mr. J. H. Barnett conveyed a one-sixth interest in the paper mill as agreed to.

Interrogatory No. 5. State what led you to the execution of the mortgage of Jan'y 23rd, 1875, on the mill property to Abram G.

Barnett, what the consideration was, and whether this was not given to secure the original bond, as it purports to do, and whether it was not the mortgage contemplated by the original agreement.

To interrogatory number five he saith: The mortgage of
486 Jan. 23rd, 1875, was given to Abram G. Barnett, executor of
J. H. Barnett, deceased, solely for and in consideration of his release of the mortgage of Dec. 13th, 1871, upon all lands to Messrs. Kamm, Zollinger, and Burgess. I had made a sale to these parties of a portion of the land covered by the mortgage of Dec. 13th, 1871, and could not complete the sale or give a clear title without this release. The mortgage of Jan. 23, 1875, was not the mortgage contemplated in the original agreement, and in all the conversations in regard to this matter had with Messrs. J. Hough, J. H. Barnett, A. G. Barnett, & D. C. Fisher they never claimed to me that it was the intention or the understanding that I should mortgage the mill property, and I repeat that had not the mortgage of Dec. 31, 1871, been cancelled that of Jan. 23rd, 1875, would not have been given.

Interrogatory number 6. State the particulars of the sale to Messrs. Burgess, Zollinger, & Kamm and the release by A. G. Barnett of your first mortgage to J. H. Barnett, what Messrs. Burgess, Zollinger, and Kamm paid, and whether the sale was not in the utmost good faith on their part and yours.

To interrogatory No. 6 he saith: The sale was made in the utmost good faith between us. The consideration paid was the amount recited in the deed to them by me, which I do not now recollect—
several thousand dollars. The negotiations for the sale and
487 purchase were between Mr. J. J. Kamm & myself, and after
the price and terms were agreed upon Edward O'Rourke, att'y, was selected by Messrs. Kamm, Burgess, & Zollinger to make an abstract of title for them. When he came to the mortgage of Dec. 13th, 1871, I informed him that Mr. A. G. Barnett, as executor of J. H. Barnett's estate, had told me that the power had been expressly conferred upon him by his deceased brother to release mortgages and do many other things that he might consider for the best interests of the estate to do, and that upon the execution of another mortgage upon property of equal value he would release that of Dec. 13th, 1871. Mr. O'Rourke accepted this arrangement as satisfactory, and I went with Mr. A. G. Barnett to Mr. W. H. Withers, had a new mortgage covering the mill property as subsequently sold to Mr. John E. Hill, Jr., prepared, acknowledged, and signed by myself and wife, and then, with Messrs. Withers, Barnett, and O'Rourke, went to the recorder's office, and Mr. A. G. Barnett signed the entry of release upon the margin of the record of the mortgage of Dec. 13th, 1871, and filed the mortgage of Jan. 23, 1875, for record. My mother subsequently released her annuity mortgage to the same property, and the deed was executed and delivered to Messrs. Kamm, Burgess, and Zollinger. It is due to Mr. A. G. Barnett to
state that the release upon the mortgage of Dec. 13, 1871, was
488 made by him out of good will to me, without any other consideration
than that already named, and, as he and the other parties connected with the transaction believed, without jeopardizing

the interests of the estate in the least or to the injury of the heirs. My recollection is also that I had some conversation with Mr. John Hough in regard to the transfer, and that he did not object.

Interrogatory No. 7. State whatever you know as to A. G. Barnett's, during the last years of his brother's, J. H. Barnett's, life, acting for him and attending to all his business matters, and also what you know, at the time of A. G. Barnett's release of the mortgage, as to his having acted as executor and trustee of his brother's estate subsequent to his decease or as agent of the devisees and legatees of J. H. Barnett—*i. e.*, the Walls, Shoaff, and Barnett's children—and whether, to your knowledge, Mrs. Wall and Mrs. Shoaff knew of and sanctioned his acts in that capacity.

To this interrogatory he saith: I do not now recall any special acts of A. G. Barnett's in attending to the business of his brother during the last year of his brother's life. I know of several instances of his collecting rents and paying taxes for his brother prior to his death. Mr. A. G. Barnett was the first to inform me of the powers given him by his brother, J. H Barnett, for the purpose of 489 avoiding all litigation and controversies on the part of those interested in the estate. I cannot say that any of the heirs objected to his acts. I saw Mr. Watson Wall in St. Louis, Mo., October, 1877, and talked with him about many things connected with the estate, and if he had any objections to Mr. A. G. Barnett's acts he did not mention them to me.

Interrogatory No. 8. State anything further which occurs to you in reference to these transactions.

Answer. I wish only to add that the first and original agreement with Mr. J. H. Barnett and myself was for the purchase of one-sixth (⅙) interest in the paper mill, and that the negotiations and arrangement for the transfer of that interest to Mr. N. B. Freeman were all subsequent to the making of the eight thousand ($8,000) dollar loan above referred to.

HENRY J. RUDISILL.

STATE OF CALIFORNIA, }
County of San Bernardino, } *ss:*

I, D.W. McLeod, a notary public in and for said county and State, do hereby certify that Henry J. Rudisill, the above-named deponent, was by me first sworn to tell the *the* truth, the whole truth, and nothing but the truth in the cause now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is plaintiff, and Abraham G. Barnett and twenty-six others are defendants; that the foregoing deposition was 490 all written by me, and that said deponent subscribed his deposition after the same had been carefully read over to him by me; that neither the plaintiff nor any of the defendants were present in person or by attorney at the taking of said deposition; that all said deposition was taken at the house of Henry J. Rudisill, at Riverside, in the county of San Bernardino and State of California, on the 4th day of June, 1881, between the hours of 8 a. m. and six p. m. of said day, agreeably in all respects to the notice hereto annexed.

In witness whereof I hereto subscribe my name and affix my seal of office this fourth day of June, A. D. 1881.

[NOTARIAL SEAL.] D. W. McLEOD,
Notary Public.

Depositions of David C. Fisher, Platt J. Wise, Warren H. Withers, Charles A. Zollinger, Benjamin S. Woodworth, and Charles E. Jones, witnesses produced and sworn *to* before me, George D. Crane, a notary public in and for Allen county and State of Indiana, on the 10th day of June, 1881, pursuant to agreement of parties.

These depositions were taken on the part of the defendants, John H. Bass and Oscar A. Simons, in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is complainant, and Abraham G. Barnett *et al.* are defendants.

491 The said DAVID C. FISHER, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 1. State your name, residence, and occupation.

A. My name is David C. Fisher; reside in Fort Wayne, Indiana, and my occupation is real estate, insurance, and land agent.

Q. 2. How long have you been engaged in the business of life insurance?

A. About fifteen years.

Q. 3. Are you acquainted with the values of life insurance and life annuities?

A. Well, yes; I am.

Q. 4. What is the cash value of an annuity of $800 for the life of a person seventy-five years of age, in good health and good prospects of longevity?

A. Well, the amount is $5,929.44, according to a valuation based on the Carlisle tables.

Q. 5. State whether or not the value of such an annuity is a fixed sum based upon approved calculations of the expectation of human life upon which the whole business of life insurance is conducted.

A. Yes, sir; it is.

Q. 6. State whether or not the sum you have named is the amount which would be necessary to purchase an annuity of $800 per annum for the life of a person seventy-five years old from any reliable and responsable insurance company engaged in the business

492 of life insurance and the sale of annuities.

A. Yes, sir; it is.

Cross-examination by L. M. NINDE, Esq.:

Q. 7. Is not your information and knowledge upon the subject of the value of annuities, about which you have been enquired, wholly from information and hearsay?

A. I get my information from the table prepared by the Mutual Life Insurance Company of New York.

Q. 8. Do you pretend to have any knowledge upon the subject by the observation of lives yourself and the comparison of the length of lives of various persons of this age? If so, state who they were, when you made the comparison, and what was the result.

A. No, sir.

Q. 9. Have you ever seen what is known as the "Carlisle Tables?"

A. Yes, sir; I have. I saw it in New York City about five years ago.

Q. 10. Can you tell from your recollection that the table made up by the Mutual Life Insurance Company, and referred to in your foregoing testimony, is an accurate copy of said "Carlisle Tables?"

A. No, sir; I cannot.

Redirect examination by L. M. NINDE, Esq.:

Q. 11. State whether or not the tables referred to by you are accepted and acted upon by persons and corporations as the basis and rule of all actual business in life and annuity insurance.

493 A. Yes, sir; I think they are.

The defendants, whose interests are affected by the proceedings of the parties taking the foregoing deposition, object to each question in it and the answer thereto, because the same are incompetent and immaterial and the said answers are based upon hearsay and not upon the knowledge of the witness.

D. C. FISHER.

The further taking of these depositions is adjourned until the 13th day of June, 1881.

GEO. D. CRANE,
Notary Public.

And now, on this 13th day of June, 1881, the further taking of these depositions is proceeded with as follows:

The said PLATT J. WISE, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 12. State your name, residence, and whether or not you were during the year 1861 recorder of Allen county, Indiana.

A. My name is Platt J. Wise; reside in Fort Wayne, Indiana, and I was recorder of Allen county, Indiana, in the year 1861.

Q. 13. Examine the mortgage from Henry J. Rudisill and wife to Elizabeth Rudisill, now placed in your hands and marked "A" by the notary, with his signature, and state whether or not, as recorder of Allen county, you recorded that mortgage; and, if so, when and where.

494 A. I did record that mortgage on the 7th day of January, 1861, in Mortgage Record, volume 7, pages 500 & 501, of the official records in the office of the recorder of said county, of which I was then the custodian.

PLATT J. WISE.

And the said WARREN H. WITHERS, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 14. Examine the mortgage now placed in your hands, marked "A," with the signature of the notary, and state, if you know, by whom and to whom it was executed.

A. This is a mortgage in my own handwriting. It was executed by Henry J. Rudisill and Elizabeth E. Rudisill, his wife, to Elizabeth Rudisill; it was executed by them in my presence and acknowledged before me as a notary.

Q. 15. State whether or not you are acquainted with the location of the lands described in that mortgage, and of the feeder to the Wabash & Erie canal, and of the property mortgaged by Henry J. Rudisill to John H. Barnett, and the property mortgaged to A. G. Barnett and known as the St. Joe mills.

A. I am and was acquainted with the lands named in the interrogatory and the property known as the St. Joe mills, as well as the location of the feeder to the canal.

495 Q. 16. State whether or not the tract of land mortgaged by Henry J. Rudisill to John H. Barnett was part of the lands embraced in said mortgage to Elizabeth Rudisill.

A. It was.

Q. 17. State whether or not the tract of land mortgaged by Henry J. Rudisill to A. G. Barnett was also a part of the land described in said mortgage to Elizabeth Rudisill.

A. All but a small portion on the east side of the St. Joseph river—a few acres—the title to which Rudisill derived from Samuel Hanna.

Q. 18. State whether or not the lands embraced in the two mortgages heretofore mentioned, executed to J. H. Barnett and A. G. Barnett, comprised all that part of the lands described in said mortgage to Elizabeth Rudisill lying east of said canal feeder.

A. They did.

Q. 19. Look at the paper now placed in your hands and marked "B," with the signature of the notary, and state what you know of its execution.

A. This paper is an assignment by Elizabeth Rudisill to John H. Bass and Oscar A. Simons of the mortgage hereinbefore spoken of, executed to her by Henry J. Rudisill and Elizabeth E. Rudisill, his wife.

W. H. WITHERS.

The further taking of these depositions is adjourned until the 15th day of June, 1881.

GEO. D. CRANE, *Notary*.

The further taking of these depositions is now, on this 15th
496 day of June, 1881, proceeded with as follows:

The said CHARLES A. ZOLLINGER, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, dep-seth as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 20. State whether or not any deed of conveyance was executed to you, Henry Burgess, and John J. Kamm by Henry J. Rudisill dated July 23, 1875, conveying lands in section 35, township 31, range 12 east, in Allen county, Indiana.

A. No such deed executed bearing that date to the parties named.

CHARLES A. ZOLLINGER.

And the said BENJAMIN S. WOODWORTH, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 21. State your name, residence, profession, and how long you have lived in Fort Wayne.

A. My name is B. S. Woodworth; reside in Fort Wayne, Indiana; am a physician, and have resided here between 35 and 36 years.

Q. 22. State whether you are acquainted with Elizabeth Rudisill; and, if so, how long you have known her, and whether you have been her medical adviser; and, if so, how long.

A. I am intimately acquainted with her and have been her medical adviser for the past twenty years or more.

497 Q. 23. State the character of her physical and bodily constitution, the state of her health, and her prospects of longevity, as compared with the average of human life.

A. I think her constitution is as good as the average for a person of her age. I have thought perhaps a better constitution than the average woman. I should think her prospects for longevity are as good as the average.

B. S. WOODWORTH.

And the said CHARLES E. JONES, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. [23½]. State your name, residence, and occupation.

A. My name is Charles E. Jones; reside in Fort Wayne, Indiana, and am deputy recorder of Allen county, Indiana.

Q. 24. State whether or not you have made from the record of mortgages in said county a copy of a mortgage and all entries in writing written upon the margin of the records thereof as the same appear on the mortgage record of said county; and, if so, produce it and state when you made it and all the facts in reference to it.

A. I have made such a copy and now produce it, and request it may be marked "Exhibit Z," and signed by the notary. It is a true copy of all that appears on the pages of the record on which
498 said mortgage is recorded, and the releases that appear upon the margins of said record are true copies thereof. I made this copy myself and compared it with the original record, and [declare] it to be correct.

Q. 25. State what the fact is as to whether or not there is upon the mortgage record any attestation written or signed by the recorder of the release appearing on said record dated January 23rd, 1875.

A. There is none.

Q. 26. State whether or not, as deputy recorder of said county, you recorded a mortgage executed by Henry J. Rudisill and Elizabeth Rudisill, his wife, to Abraham G. Barnett, dated January 23rd, 1875, and conveying a tract of land described by metes and bounds, and also named as the St. Joe mill property, to secure a bond executed by Henry J. Rudisill to John H. Barnett in the penal sum of $10,000; and, if so, state the date on which you recorded it.

A. I recorded said mortgage in the mortgage record of Allen county, Indiana, on January 26th, 1875.

CHAS. E. JONES.

And the said DAVID C. FISHER, being recalled, deposes as follows:

Examined by R. S. TAYLOR, Esq.:

Q. 27. State the present cash value of an annuity of $800 per annum for the life of a person seventy-six years old, of good constitution and of average expectation of life.

A. The present cash value would be $4,823.04.

Cross-examination by T. E. ELLISON, Esq.:

499 Q. 28. How do you compute that?

A. I take the annuity tables of the Mutual Life Insurance Company of New York at the age of 76 years, and find there the present value of an annuity of $100 per year, and I multiply that by eight and arrive at the value above given.

Q. 29. What is the expectation of life at 76?

A. I do not know.

Q. 30. What rate per cent. of interest do you compute this present value at?

A. I do not know.

Q. 31. Do not those tables show an expectancy of six and one-third years at that age?

A. They do.

Q. 32. Would not $4,880 pay an annuity of $800 per year for that length of time, without taking from it what the use of the money is worth?

A. Yes; I should say it would.

Q. 33. In getting the present value of a demand do you not deduct from the amount what the use of a sum is that will produce that amount when the demand becomes due?

A. I do not exactly comprehend that question.

Q. 34. How would you compute the present value of a note of $800, payable in three years, without interest, provided the use of the money is worth six per cent. per annum?

A. I do not know.

Redirect examination by R. S. TAYLOR, Esq.:

500 Q. 35. State whether the value of an annuity, as given by you, is a matter of computation by you or a fixed market value recognized and acted upon by respons*a*ble companies engaged in the business of life and annuity insurance.

A. It is a fixed market-value.

Recross-examination by T. E. ELLISON, Esq.:

Q. 36. What knowledge have you of the value of annuities in the market, either from seeing others purchase or dispose of yourself?

A. I have none.

D. C. FISHER.

STATE OF INDIANA, } *ss*:
Allen County, }

I, George D. Crane, a notary public within and for said county, hereby certify that the above-named David C. Fisher, Platt J. Wise, Warren H. Withers, Charles A. Zollinger, Benjamin S. Woodworth, and Charles E. Jones were by me first duly sworn according to law to testify the truth, the whole truth, and nothing but the truth relating to said cause; that their depositions were reduced to writing by me; that the said depositions were taken at the office of W. H. Withers, in Fort Wayne, Allen county, State of Indiana, on the 10th day of June, 1881, and subsequent days, as shown by the adjourning orders therein, by agreement of counsel representing the several parties.

In testimony whereof I have hereunto set my hand and notarial seal this 17th day of June, 1881.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

501 Deposition of Warren H. Withers, a witness produced and sworn before me, a notary public, in and for Allen county and State of Indiana, on the 22nd day of April, 1881, pursuant to agreement.

These depositions were taken on the part of defendant, Abraham G. Barnett, in a certain action now pending in the circuit court of the United States for the district of Indiana, wherein George P. Bissell, trustee, is complainant and Abraham G. Barnett *et al.* are defendants.

The said WARREN H. WITHERS, being duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, deposes as follows:

Examined by L. M. NINDE, Esq.:

Q. 1. State your name, age, residence, occupation, and whether you are acquainted with the parties to this suit, and also if you are acquainted with the property known as the St. Joe mill property.

A. My name is W. H. Withers; I reside in Fort Wayne, Indiana; am of lawful age; my business is practicing law; I know the Rudisills, Barnetts, Kamms, Shoaffs, Burgess, Bass, and Simons, and I am acquainted with said property.

Q. 2. State what connection you had with the said St. Joe mill property, as agent of the owners or otherwise, in reference to the sale thereof, and to whom such sale was made, with whom the
502 negotiations were had, who paid the money, and how much. In this connection state anything you know pertaining to a certain mortgage on said premises in favor of Mrs. Elizabeth Rudisill, what disposition was made of it, and to whom, and who conducted the negotiation.

A. I had no connection with the mill property as the agent of any one. Mrs. Elizabeth Rudisill held upon that and other property a mortgage executed to secure to her a life annuity. I had possession and control of that as her agent and attorney; for her I negotiated a sale of the mortgage to the defendants Bass and Simons, I think. The negotiations were principally between Mr. Simons and myself—portions, however, were with him and Mr. Bass. The precise amount for which the sale was made I do not remember. It is truly stated, I think, in the deposition of Mrs. Rudisill taken in this cause.

Q. 3. What do you know, if anything, with reference to the sale of the said property to the defendants Bass and Simons?

A. I don't know anything about a sale of the property to Bass and Simons, they, so far as I know, being the purchasers of the mortgage spoken of only.

Q. 4. What knowledge have you, if any, as to the sale or conveyance by John E. Hill of his interest in said property, who negotiated with or for him for the sale of that property, and with whom
503 were the negotiations conducted?

A. John E. Hill conveyed, I think, his interest in the property to George Esmond. The consideration of the conveyance was $1,000. I think I conducted principally the negotiations for that sale. I acted at the instance and request of Oscar A. Simons, who furnished to me the consideration, which I handed to Hill.

Q. 5. Please state what you know, if anything,— what interest said Hill owned and conveyed by said deed; also, what you know, if anything,— who owned or conveyed the remaining interest in said property, and to whom it was conveyed, upon what terms, and upon what consideration.

A. Hill claimed, I think, and conveyed, subject to the incumbrances upon it, the undivided one-half of this property. Henry J. Rudisill owned, as Hill did, the other undivided one-half of it.

He conveyed his interest to his sister, Eliza C. Rudisill, I think, without any money consideration, and I cannot say of my own knowledge to whom Eliza C. Rudisill conveyed the property, for what consideration or upon what terms.

Q. 6. What connection had the conveyance by said Eliza C. Rudisill of her interest in said property, if any, with the sale of Mrs. Elizabeth Rudisill's annuity mortgage spoken of above?

504 A. It had this connection: Mrs. Rudisill held upon that and other property the mortgage I have spoken of. She desired to sell it. It seemed it could not be sold without the conveyance of the interest of Henry J. Rudisill and John E. Hill to some other person. After negotiations the interest of Hill was conveyed, as I have stated. At my suggestion Henry J. Rudisill conveyed his interest to his sister, Eliza C. As I have said, I have no personal knowledge as to whom she conveyed. After[ward], however, the defendants Bass and Simons purchased and paid for the mortgage, as I have stated.

Q. 7. What do you know, if anything, as to Bass and Simons requiring the conveyance of the whole equity of redemption in said mill property to such person as they should direct as a necessary condition to their purchase of the annuity mortgage?

A. Mr. Simons—and, I think, they—expressed a disinclination to purchase the mortgage unless both Rudisill and Hill were divested of their equity of redemption. They did direct, so far as the John E. Hill interest is concerned, to whom the conveyance should be made, and through the negotiations it was understood they were to designate the person to whom the conveyances were to be made.

W. H. WITHERS.

STATE OF INDIANA, } *ss:*
Allen County, }

505 I, George D. Crane, a notary public within and for said county, hereby certify that the above-named Warren H. Withers was by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that his deposition was reduced to writing by me; that the adverse parties attended by their attorneys, and said deposition was taken at Fort Wayne, in Allen county, State of Indiana, on the 22nd day of April, 1881, between the hours of 8 a. m. and 6 p. m. of said day.

In testimony whereof I have hereunto set my hand and notarial seal this 17th day of June, 1881.

[NOTARIAL SEAL.] GEO. D. CRANE,
Notary Public.

And the court, having heard the evidence and the argument of counsel, doth now here take said cause under advisement for further consideration, and the same is reserved for final determination.

And the court doth now appoint Robert S. Robertson special master to take and hear testimony as to the values of the various tracts of land, and report his finding thereon to this court at his earliest convenience.

And afterwards, to wit, at the term of said court first aforesaid, on the 12th day of December, A. D. 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further
506 proceedings in the above-entitled cause were had, to wit:

Come now the parties hereto, by their solicitors, and now also comes Robert S. Robertson, heretofore appointed special master herein, and files his report herein in these words, to wit:

In the Circuit Court of the United States, District of Indiana.

GEORGE P. BISSELL, Trustee, *vs.* ABRAM G. BARNETT *et al.*

Before R. S. Robertson, as special master to take testimony and report cash values of certain tracts and parcels of land in controversy in the above-entitled cause.

The undersigned, special master as aforesaid, respectfully submits the following report, to which is attached the testimony taken before him and a map of the premises, as required by said order, premising his report by the statement that the evidence shows that the mill and appurtenances have depreciated from $3,000 to $6,000 since 1875, and that the real estate has appreciated from 20 to 40 per cent. in the same time.

1. That the value in cash, as found from the evidence, of the premises covered by the annuity mortgage described in the cross-bill of Simons & Bass, inclusive of the portion released by Elizabeth Rudisill on the date of the deed executed by H. J. Rudisill
507 and wife to Burgess, Zollinger & Kamm, which is claimed —
all of the tract enclosed in red lines upon said map (except tract No. 1), and the mill and appurtenances, strip east of Spy Run avenue, dam, river, and No. 4, in section thirty-five, is twenty-eight thousand eight hundred and sixty-eight dollars ($28,868.00).

2. That the value in cash of the same described premises, exclusive of the portion released by said Elizabeth Rudisill, which is claimed to be the same tract, and also Nos. 1 and 3 and the strip east of the west side of Spy Run avenue, as found from the evidence, is twenty-nine thousand one hundred and twenty-eight dollars ($29,128.00).

3. That the value in cash of the property described in the mortgage executed to John H. Barnett by Henry J. Rudisill and wife, to secure the indemnity bond described in said J. H. Barnett's mortgage, which is claimed to be all of the premises within the red lines upon the map except that east of the west line of Spy Run avenue, as found from the evidence, is ten thousand one hundred and twenty-eight dollars ($10,128.00).

4. That the value in cash of the property described in the mortgage executed by H. J. Rudisill and wife to A. G. Barnett, which is claimed to be all the property bordering upon the river, in-
508 cluding the mill site and appurtenances and Nos. 4 and 5, as
found from the evidence, is twenty thousand one hundred dollars ($20,100.00).

5. That the value in cash, as found from the evidence, of the premises described in the last-mentioned mortgage as lying in section 36, claimed to be No. 5 on said map, is eleven hundred dollars ($1,100.00).

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6. That the value in cash, as found from the evidence, of the premises described in the deed executed to Burgess, Zollinger, and Kamm, claimed to be all the premises included in the red lines on the map, west of Spy Run avenue, except Nos. 1 and 3, is eight thousand three hundred and sixty-eight dollars ($8,368.00).

7. That the value in cash, as found from the evidence, of the premises described in said conveyance, not included in said mortgage of H. J. Rudisill, and claimed to be No. 6 on said map, is three hundred and five dollars ($305.00).

8. That the value in cash of the portion of said Burgess, Zollinger, & Kamm purchase not included in the annuity mortgage, but included in the mortgage of Henry J. Rudisill and wife to J. H. Barnett, which is claimed to be that portion of the Burgess, Zollinger, & Kamm addition lying south of the red line on said map, as found from the evidence, is eight hundred dollars ($800.00).

9. That the value in cash of the premises not appearing on
509 said map, but included in the trust deed of J. H. Barnett to
Geo. P. Bissell, dated July 15, 1869, to wit: All of lot No. 105 in the original plat of Fort Wayne, except a ten-foot alley off the east side, being 50 feet front on Berry street, and that part of lot 106 in the original plat of Fort Wayne fronting on Calhoun street 20 feet and bounded by the east and west line of said lot, and two lines 20 feet apart parallel to the north line of said lot, as found from the evidence, is twenty thousand five hundred dollars ($20,500.00).

10. That the separate value in cash, as found from the evidence, of each of the tracts included in said order of reference is as follows:

Of No. 1, as shown by the map	$260 00
Of No. 2, as shown by the map	1,768 00
Of No. 3, as shown by the map	1,500 00
Of No. 4, as shown by the map	1,500 00
Of No. 5, as shown by the map	1,100 00
Of No. 6, as shown by the map	305 00
Of Burgess, Zollinger, & Kamm's addition, as shown by map	7,400 00
Of the portion of said addition south of the red line, separately	800 00
Of the mill, water power, and all appurtenances	17,500 00
Of the parts of lots 105 & 106, original plat of Fort Wayne	20,500 00
Total value of all tracts	$51,833 00
Total value of all tracts, except the parts of lots 105 & 106	$31,333 00

All of which is respectfully submitted.

R. S. ROBERTSON,
Special Master.

(Here follows diagram marked p. 510.)

511 In the U. S. Circuit Court, Dist. of Indiana.

GEORGE P. BISSELL *vs.* ABRAM G. BARNETT *et al.*

Testimony of witnesses sworn and examined before R. S. Robertson, special master, appointed by said court to take testimony and determine the value of certain tracts in controversy in said cause, taken at Fort Wayne, Indiana, on the 8th day of July, 1882.

ISAAC W. CAMPBELL, of lawful age, being duly sworn, testified as follows: Reside in Fort Wayne, Allen county, Indiana; my age is 47; occupation, clerk and deputy auditor of Allen county; I have appraised real estate in the city for taxation for 8 years; have a general knowledge of Burgess, Zollinger, & Kamm's addition to Fort Wayne, and know its location; am acquainted or think I have a general knowledge of the value of lands in the neighborhood of that addition. In connection with my duties as assessor, I have studied the values of land in the city, but not outside; have never appraised any of these lands; the addition lies northeast and adjacent to the north city limits part way.

Ques. State what, in your opinion, is the present cash value per acre of said addition.

Ans. Where that land is I should judge from $250 to $300 per acre would be a fair price for it; that is, a fair average per acre for that land.

512 Ques. Please examine the map of the premises above described and the neighborhood, and state your opinion of the value of the property described in the John H. Barnett mortgage west of the St. Joseph road.

Ans. From $250 to $300 per acre as an average value. As to the mill lot, I am not acquainted with the house, but would estimate the lot itself as worth $500 per acre, lying on the street so, whatever there is of it.

Ques. State what, in your opinion, is the value per acre of the gore of land lying south of the Burgess, Zollinger, & Kamm addition, and between the addition and the old Spy Run road.

Ans. About $250 per acre.

Ques. State what, in your opinion, is the present cash value of the piece of land lying between said land and the canal feeder lying north of the reserve line and north *to* Eckert's addition.

Ans. Well, that is broken in there; Spy run runs through it; $100 per acre is enough for that.

Ques. I will now call your attention to a piece of land lying east and north of the St. Joseph river, and also east of the west line of section 36, containing in the neighborhood of five acres of land; in view of its present situation and its condition as to the river and the quality of the land, state what, in your opinion,
513 its cash value is.

Ans. My impression is that it is mostly washed away, and I have no opinion of its value.

Ques. Suppose this five acres is bare during ordinary water, containing a beach of gravel and sand, what would it be worth?

Ans. I have no value at all to put on it; would not give anything for it as I understand it.

Ques. If there is any high ground there what would it be worth per acre?

Ans. Not worth over $60 per acre, if anything at all.

Cross-examination by R. S. TAYLOR:

Have not been engaged in the purchase or sale of property there lately, nor in the city; have bought none or sold none for myself or any one else; do not know the fact that property in that neighborhood, after being out of market, has come into demand; do not know of any sales being made there lately; my opinion is not based upon any actual transactions of sales.

Ques. What would be your opinion of lots in the Burgess, Zollinger, & Kamm addition by the lot?

Ans. Some lots from $150 to $200, and some I would not give $50 for. Those on Spy Run avenue, better situated, and those
514 further back, it would be hard to sell at all. I would put an estimate on the whole thing at $80 per lot.

Ques. State whether your experience and opportunities of learning the value of real estate are not derived entirely from experience in the assessment of property for taxation and such purposes rather than in the purchase and sale of it.

Ans. Yes; but I give you a general idea from sales reported at the office and transfers, but I never sold lands as a real estate agent or anything of that kind.

Cross-examined by S. R. ALDEN:

Ques. State what, if any, difference there is in the cash values of the various pieces of property, concerning which you have just testified, at the present time and in the early part of 1875.

Ans. I should think 20 per cent. more to-day all through all the pieces.

Ques. Do you know accurately how the various pieces concerning which you have testified lay as to height above the river? State your means of knowledge.

Ans. My means of knowledge are from observation; have seen it within a week. I know nothing of the condition of all east of the river as to water-level.

Ques. State how many sales of property you have known of in that neighborhood the past five years and for what it sold.

Ans. I don't think I can answer that question. I can't now
515 call to mind any voluntary sales.

Re-examined by L. M. NINDE:

Ques. You may state whether from your position of deputy auditor and in transferring deeds, and from your duties as assessor for the past eight years, you have made the subject of values of real estate in and approximate to the city of Fort Wayne a matter of careful study.

Ans. I can't say careful study; but I have paid a good deal of attention to it.

I. W. CAMPBELL.

ISAAC D'ISAY, being duly sworn, testified as follows:

My name is Isaac d'Isay; 43 years of age; residence, Fort Wayne, Ind'a; occupation, real estate broker; have been engaged in that business about eight years, and have given my exclusive attention to it for two or three years last past; am acquainted with the Burgess, Zollinger, & Kamm addition, lying north of Fort Wayne; am acquainted with the value of that real estate and of real estate in that neighborhood.

Ques. State the average cash value per acre of said addition.

Ans. I should say between $300 and $350.

Ques. State the value in cash of the gore of land lying between the old Spy Run road and said addition. State the value per acre.

Ans. About $400 per acre; worth a little more than the other.

516 Ques. State the value per acre of the premises lying west of said addition, north of the reserve line, east of the feeder, and south of Eckert's addition.

Ans. Between $250 and $300 per acre.

Ques. State the cash value of a piece of land containing about five acres lying north and east of the river in section 36. State the value per acre of such portion of it as is below high water and of such portion as is above the high-water mark.

Ans. What is above high-water-mark I should say $100 per acre, and what is below $50 per acre.

Ques. State the value of the piece of property known as the mill lot, pointed out to you on the map, on the hypothesis that the area is equal to three lots.

Ans. Five hundred dollars without improvements.

Cross-ex. by R. S. TAYLOR:

Ques. What is your estimate of the value of lots in the Burgess, Zollinger, & Kamm addition as lots?

Ans. From $50 to $100, according to location—an average of $75 per lot.

Ques. Are your opinions on this subject based on recent sales and transfers? And, if so, state what they are.

Ans. I have made no sales of lots there this year. It was based only on general knowledge of the value of property in that neighborhood.

517 Cross-ex. by S. R. ALDEN:

Ques. What per cent. increase has there been in the cash value of the various pieces of land concerning which you have testified since January, 1875?

Ans. In my opinion there has not been any increase; there has been a decrease of at least fifty per cent.

Ques. Have you ever been on the property in section 36 about which you have testified; if so, state what you know of its condition as to high-water mark, the value of gravel pits in general, and especially of the one located on this piece of land?

Ans. Have never been on the land; have ridden past it several times. I based my former testimony on its producing value as farm land. I don't know that there is a gravel bed there; of course, if there is a gravel bed there it would add very much to its value.

Ques. How many lots and for what prices have you sold in and adjoining Burgess, Zollinger, & Kamm's addition since you have been in the business?

Ans. I don't remember of having sold any; am not personally cognizant of the sales of any lots in or adjoining this addition, or of prices paid, since I have been engaged in real estate business.

Re-ex. by L. M. Ninde:

518 Ques. From your knowledge of the demand for lots away from the centre of this city, and the number of additions and lots and tracts of land for sale, what is your opinion of there being any immediate demand for this property as town lots?

Ans. I think there will be no immediate demand unless created by men employed by the new railroad and the building of shops near the land.

ISAAC D'ISAY.

John E. Hill, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation up to January, 1880.

Ans. John E. Hill; age, 41; residence, Washington township; occupation, manufacturer. In 1875 I purchased a half interest in the Rudisill mill and mill site and run the mill from then until 1880. I have lived in the immediate neighborhood of the mill ever since.

Ques. State as full a description of said mill, premises, dam, race, and power as you can, including the amount of water power there is there and its value at this time.

Ans. There is a power there of from eight to eight and one-half feet; the abandonment of the canal makes it a perpetual power, except in high water; it has four run of stones; the power would operate
519 four runs night and day, but at that time had to be a little careful of the water; from appearance the dam is in good condition; there is 14 or 15 acres, more or less, included in the mill site. I should think the present cash value of the mill property is $25,000.00. I am acquainted with the value of it from having worked it for years. I have some knowledge of values in neighborhood of Burgess, Zollinger, & Kamm's addition.

Ques. State what is the present cash value per acre of all they bought, running down to the feeder.

Ans. I should think from $300 to $400 per acre.

Ques. I now call your attention to a gore of land between the old Spy Run road and the addition containing about one-third acre. Give its value per acre. I also call your attention to a piece of land west of the addition, north of Wells' reserve, east of the feeder, and south of Eckert's addition; also the lot known as the Mill lot; also the five acres in section 36 north and east of the St. Joseph river. Please state separately the value of said pieces per acre, except the mill lot. Give its value in gross.

Ans. The gore first mentioned is worth at the rate of $600 to $800 per acre; as to the piece next described I don't — there is much value to it taken separately from the other; worth, perhaps, $50 per acre any way; the lot known as the Mill lot, with the improve-
520 ments, is worth $1,000; the five acres in section 36 is worth $200 per acre.

Cross-ex. by R. S. TAYLOR:

Ques. Do you base your estimate of the value of the mill upon the assumption that the canal and its water powers have been abandoned?

Ans. No, sir.

Ques. Upon the assumption that the owners of the canal are still entitled to maintain the feeder dam to its full height, and take out of the St. Joseph all the water which it will divert, do you still think the mill property worth $25,000?

Ans. Yes, sir.

Ques. Is it not a fact that the flow of water in the St. Joseph has materially decreased within 15 or 20 years?

Ans. I can't say as to that. I can answer it in this way: that the water runs off quicker. There is just as much water in the St. Joseph at times as ever, but it runs off more quickly, as the woods are cut off.

Ques. It is therefore true that it is subject to more excessive floods at one time and more protracted low water at other times than formerly?

Ans. Yes; more so than 15 or 20 years ago.

Ques. If the feeder dam should be maintained to its full height and kept tight, and all the water which it would thus divert from the river drawn off through the feeder and used, would it not
521 leave the Rudisill mill with little or no water during a large part of the year?

Ans. Only in the dry season. They can't divert it; there is too much water.

Ques. During the time that you run that mill did you not have scarcity of water during a considerable portion of the year?

Ans. I did one year, and perhaps two during the time I run it. There was one year of very severe drouth, lasting 3 or 4 months.

Ques. Is it not the fact that for ten years past or more the disuse of the canal has caused very much less water to be taken out of the river than would have been taken if it had been freely used and the feeder kept clear and full to its entire capacity?

Ans. I don't think so. The feeder has been kept full to my knowledge; so full that it run over its banks at times.

Ques. Was not the amount of water flowing through it very much less than would have flowed if it had been used by the canal for navigation or milling, so as to have exhausted its full capacity?

Ans. I don't see how they could have got more through. It was full with a swift current.

Ques. What is the condition of the mill building and its machinery?

Ans. I have not been in it for nearly two years, and do not know.

Ques. Was it not when you last saw it in a very dilapidated and bad condition?

522 Ans. It was.

Ques. You may state whether the water power at that mill has not been substantially reduced a large part of the time for a number of years past by the addition of flash-boards on the comb of the feeder-dam?

Ans. It would be for a short time until the water had risen over the flash-boards. The sudden cutting off of the flow would reduce the water below, of course.

Ques. Were not the occasions when the water was thus diverted the very times when its loss was most seriously felt at the mill?

Ans. It was seriously felt when diverted, of course, but it would have been seriously felt at any other time.

Ques. Have not those flash-boards been kept on the feeder-dam during the 5 or 6 months from late spring to fall for a number of years past?

Ans. They have been put on in the late spring or early summer when the grass obstructed the channel of the canal to force the water down.

Cross-ex by S. R. Alden:

Ques. Was not the Rudisill mill and machinery in fair running condition and repair in January, 1875, and has it not been rapidly running down ever since?

Ans. During the time I was there it was running down after 1876,
because of no repairs being made. In January, 1875, it was
523 in fair condition, so it could be used. It deteri[or]ated steadily
from 1875 to 1880; since that time I don't know. The mill
and machinery was old fashioned, with no modern improvements, but was, in 1875, in all respects a good four-run-of-stone mill. In 1877 or 1878 the foundation gave way somewhat and the floor settled.

Ques. Have you ever been interested in or personally cognizant of purchasing or sales of other mill property than this concerning which you have testified, and are you familiar with the value of mill property in general? State fully to what extent your knowledge goes.

Ans. I have not been personally interested or known personally of sales of other mill property. My knowledge of mill property and milling comes solely from my experience in this mill.

Re-ex. by L. M. Ninde:

Ques. How long have those flash-boards been used on the feeder-dam?

Ans. Only 2 or 3 years before the dam broke—in those very dry years—never were any on before 1872, '3, & '4 to my knowledge.

Ques. Without any flash-boards on the dam you may state whether there is not water sufficient in ordinary seasons for the mill.

Ans. In ordinary seasons I should say there was sufficent water nine months out of twelve—that is, the mill would run nine months out of twelve in view of back water as well as low water.

524 Ques. How much grinding will that power do during that nine months in the year?

Ans. About 500 bushels a day, running 24 hours a day.

JNO. E. HILL.

Hearing adjourned.

Hearing resumed this 11th day of July, 1882.

GEORGE A. LITOT, of lawful age, being duly sworn, testified as follows:

My name is George A. Litot; age, 54 years; reside in Washington township, Allen county, Indiana; I have been engaged in the milling business at Rudisill's mill from 1852 to 1857; at City Mills from 1857 to 1859; from 1859 to 1860, at Stoner's mills, 11 miles out of Fort Wayne; from 1860 to 1879, nearly 1880, at Rudisill's mill again, and from 1879 to 1880, 2 months, at Orff's mill, and 14 months at Monning's mills.

Ques. Are you then acquainted with the value of said Rudisill's mill, including the water power, the dam, race, and all the land connected with the mill? If so, state what it is fairly worth.

Ans. I am well acquainted with its value, for I know what it has done. In my opinion, I think the mill and mill power is worth $20,000 to $25,000, outside of the land. The land I don't know much about.

Ques. State the amount of power on a general average there is there, and how many run of stone it will operate.

Objected to by S. R. Alden.

525 Ans. During the time I was there we operated four run of stone during 8 or 9 months of the year. I mean that on an average that number could have been run. For six months in the year it will run four run of stone, perhaps more, and for two or three months more, according to the season, there could be from one to three run of stone. The balance of the year, from two to three months, there could only be one run of stone for six to eight hours per day. There has never been but one year while I was there that we could not run at all, and that was caused by Hill drawing off the water to let contractors get gravel out of the river above the dam.

Ques. How many run of stone will that water power operate during the portion of the year the water is in the best condition for operating?

Objection by S. R. Alden.

Ans. I hardly know what to answer. To answer that a man would have to gauge the water and measure the amount of water running over the dam. There could be at least twenty. I would consider that question almost as if I was asked how many the falls of Niagara would run.

Ques. How long will the water power, during the time you was at Rudisill's mill, one year with another, operate six run of burs?

Objected to by S. R. Alden.

Ans. We never had six runs to operate, but for six months or more I consider it would have operated that number.

526 Ques. With the improved machinery for milling now in use, how many bushels of wheat will one run of stone manufacture into flour in 24 hours?

Objected to by S. R. Alden.

Ans. A run of stone ought not to manufacture over seven bushels per hour, or 168 bushels per 24 hours.

Cross-examination by S. R. Alden:

Your business is that of practical miller, and your milling experience has been simply superintending the running of mills, and you never owned a mill or was engaged in buying or selling or dealing in mills, if I understand you?

Ans. That is correct.

What was the value of the mill and machinery alone, concerning which you have testified, in former years, when it was in good repair and good condition?

Ans. Such things are estimated according to the value of the materials. In 1875 I would have thought the mill and machinery worth about $6,000 at the outside figure.

What is your opinion of the present cash value of the mill and machinery?

Ans. My opinion is that the whole business is worth just as much as old iron and old timber is worth. There are three runs of burs that are good—worth, say, $100.00.

Would not it cost as much to clear the old building and machinery away as the old iron and timber would sell for?

527 Ans. That is hard for me to answer. I think the work would be fully worth the material.

Did you not have all the water of the St. Joe river part of the time you were in the Rudisill mill when the canal feeder-dam was out?

Ans. Yes; we had it about one year.

Redirect ex.:

Q. You may state what kind of business Hill did while you were with him and the extent of his custom.

Ans. All that I can tell was, we done a first-rate custom business.

By S. R. Alden:

Don't you know that Hill's receipts were so much less than his expenses that he failed and lost his half interest in the mill?

Ans. That was after the mill broke down; while the mill was in order he made money.

GEO. A. LITOT.

July 12, 1872.

Testimony of David C. Fisher, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation.

Ans. My name is David C. Fisher; age, 39 years; residence, Fort Wayne, Indiana; occupation, real estate and insurance agent; have been engaged about 16 years in real estate business in and about Fort Wayne.

528 Ques. You may state whether you are acquainted with the land described in a mortgage from Henry J. Rudisill and wife to John H. Barnett, the foreclosure of which is involved in this suit; and, if so, how long you have known the property and what you had to do with the taking of said mortgage.

Ans. I know the location of the property. The mortgage was, I think, taken about ten years ago. I may have written the mortgage for them; am not positive.

Ques. State whether or not you are acquainted with the value of said premises and of the other real estate in that neighborhood.

Ans. Well, yes; I think I have a knowledge of it.

Ques. State what, in your opinion, said premises described in said mortgage, lying west of the St. Joseph road, *is* worth per acre in cash.

Ans. I should say about $300.00.

Ques. Please state the value in cash of the gore of land which lies between the old Bloomingdale road and the Burgess, Kamm, & Zollinger addition. Give the value per acre.

Ans. One hundred dollars per acre.

The map marked Exhibit A is by agreement attached to and made a part of these depositions, and is agreed to be a map of a correct survey of the premises described in the order of the court directed to me as commissioner, except the premises mortgaged by J. H. Barnett to George P. Bissell in July, 1869.

529 The gore of land lying between the old Bloomingdale road and the Burgess, Kamm, & Zollinger addition is marked on the map as No. 1.

The premises lying west of said addition, north of the reserve line, east of the feeder, and south of Eckert's addition *is* marked No. 2 on said map.

The premises north and east of said addition, west of St. Joseph road, and south of Eckert's addition *is* marked on the map as No. 3.

The premises east of the St. Joseph river and south of the St. Joseph turnpike, in section 35, *is* marked No. 4.

The 5.47 acres lying east of the river, in section 36, and described in the A. G. Barnett mortgage *is* marked on the map as No. 5.

Ques. I will now call your attention to the premises marked on the map as No. 2, through which Spy run flows, and ask you to — its value in cash.

Ans. One hundred dollars per acre.

Ques. I will now call your attention to a lot called the mill lot, on which there is a small house, and marked No. 3 on the map, and ask you its cash value.

Ans. Including the house, that piece of property is worth about $800.00.

Ques. I now call your attention to lot marked on the map as No.
5, containing about 5.47 acres, and ask your opinion of its
530 cash value.

Ans. Well, about $100 per acre.

Ques. State now your opinion as to the value in cash of lot No. 4, containing 4.29 acres, known as the ice-house property.

Ans. $100 per acre.

Cross-ex. by S. R. Alden:

Ques. How many lots have you sold in or adjacent to Burgess, Zollinger, & Kamm's addition since 1875? If any, state location and prices.

Ans. None at all that I can think of.

Ques. How many sales of lots or pieces of land in or adjacent to the Burgess, Z., & K. purchase have you been personally cognizant of since 1875? State dates of sales, if any, and prices realized.

Ans. None, I think.

Ques. Have you known of any bids or offers since 1875 for lots or pieces of land included within or adjacent to the various pieces concerning which you have testified on your direct examination?

Ans. I had a bid two years ago this summer for a lot in Burgess, Z., & K.'s addition; think the price offered was $200 for the lot, but it was not sold.

Ques. How closely have you examined the various prices of property you have testified about in your direct examination?

Ans. I examined all the property last Sunday by taking a
531 general or casual look at it, and have been out that way quite
frequently.

Ques. Do you know anything about the value of No. 5 for the purpose of [a] sand and gravel pit, either as to the sand and gravel in the land or the accumulation of sand and gravel after every freshet upon the river bank?

Ans. No; I do not. My idea of the value of the land is based on its uses for other purposes.

Ques. In your opinion as to the value of the 4.29 acres marked No. 4 on the map, did you include the value of the large ice-house on it?

Ans. I did not.

Ques. Has there been any change in the demand for building lots and the cash value of building lots in and adjacent to the city of Fort Wayne during the past four or five years? If so, state what change.

Ans. I think not in that vicinity. There has been some improvement in some localities.

Ques. How many building lots have you for sale in the vicinity of the property about which you have testified?

Ans. Well, about a dozen lots in North Side addition, Bloomingdale, about one-half mile west of the property concerning which I have testified.

Ques. What per cent. greater have the sales of real estate been
in the city for the last eighteen months as compared with
532 the sales for an equal length of time for the five or six years
preceding?

Ans. The per cent. of sales for the last eighteen months have not been so great.

Re-ex.:

Ques. You may state what premises you have—whether divided into lots, or otherwise—within a reasonable distance from this property, north of the city.

Objection by S. R. Alden.

Ans. I have the Henry J. Rudisill homestead north of this, containing about 83 acres, with only one or two lots of this land west of the feeder, and within 20 rods of this land, for sale as agent; I have 40 acres still north of that, about one-half mile northwest; I have several lots across the St. Joseph river by the ice-house—Mrs. Skinner's out-lots—east of Henry Hanna's house, three-fourths mile east of this property.

Ques. You may state whether you have not property for sale and have not sold property in every region in and about this city in the last sixteen years.

Objection by S. R. Alden.

Ans. Yes, sir; I have.

Ques. State what the facts are—whether or not you have made the value of property in the neighborhood of the real estate in controversy, as well as the value generally throughout the city, a study during the last sixteen years.

Objection by S. R. Alden.

533 Ans. Yes, sir; I think I have.

Ques. What is your opinion as to whether there is any immediate market for lots in Burgess, Zollinger, & Kamm's addition as lots for cash, unless it be for purposes of speculation?

Objection by S. R. Alden.

Ans. I think lots can be sold in that addition within the coming year at any time when there is a demand for lots.

Ques. At about what rate, as compared with the prices you have testified to?

Objection by S. R. Alden.

Ans. At about the same prices.

Recross-ex.:

Ques. This forty-acre piece and eighty-acre piece and the Skinner property you speak of are from one-half miles to a mile and one-half distant from the city limits, are they not?

Ans. Not the Rudisill place, nor the forty acres, but the Skinner place is about that; it is two miles from the city limits.

Ques. Is it not a fact that the eighty-acre tract and the forty-acre tract are both on the west side of the canal feeder and from half a mile to a mile distant from the city limits, and merely farming land?

Ans. Yes, sir.

D. C. FISHER.

Also George W. Jones, who, being duly sworn, testified as follows:

534 Q. State your name, age, residence, and occupation.

Ans. My name is George W. Jones; age, 49 years; residence, Fort Wayne, Indiana; occupation, real estate agent; have been for six years.

Ques. Are you acquainted with the property known as the Burgess, Zollinger & Kamm addition and property adjacent to it; and, if so, are you acquainted with its cash value?

Ans. I know where the lands is. I do not know its value.

Ques. Are you acquainted with the values of property in that neighborhood?

Ans. No, sir.

Ques. Have you such knowledge of said lands and the lands in the neighborhood and the markets thereabouts as to enable you to exercise a reasonably accurate knowledge of the values thereabouts?

Objection by S. R. Alden. Sustained.

Ques. Have you had any property for sale in that neighborhood?

Objection by S. R. Alden.

Ans. Yes. I have a lot now in that neighborhood for sale, and several lots within one-half mile for sale on commission.

Ques. You may state what attention you have paid to the value of lands and lots in that neighborhood.

Objection by Mr. Alden.

Ans. I have not paid any.

GEORGE W. JONES.

535 Testimony of CHRISTIAN TRESSETT, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation.

Ans. My name is Christian Tressett; age, 59; Fort Wayne, Indiana, is my residence; occupation, mill owner and manager for thirty years off and on—say 23 years in all.

Ques. State whether you are acquainted with the property north of the city known as the Rudisill mill.

Ans. Yes. I have been through it and seen the mill; am also acquainted with the water power.

Ques. You may state whether you are acquainted with the water power independent of the mill, but simply as a water power.

Ans. I should say it was worth $1,200 per year, exclusive of the repairs, which would be about $200 to $300 per year; am acquainted with the value of the water power. Ours pays $1,800 a year, and that one, if situated in town, would be worth the same. It is worth from $1,200 to $1,500 per year—say $1,200—exclusive of repairs. I think I am acquainted with such values.

Ques. You may state what, in your opinion, the present value of that mill seat, dam, race, and power, with all attached to it, is.

Ans. I should say from $23,000 to $25,000 for water power, mill, and buildings.

Cross-ex. by S. R. ALDEN:

536 Ques. If you are familiar with the mill and machinery in it, please tell us what the mill and machinery is worth as it stands.

Ans. I think it would not be worth over $3,000. It is now in very poor condition.

Ques. Is this mill and machinery worth anything as it now stands, in connection with the water power and mill site, for milling purposes, or is it not a fact for the purpose of getting interest on the capital necessarily invested in that water power and mill site that the mill in its present condition is a damage to the property, or at least worth only what it would bring for timber and old iron after paying the expense of tearing it down?

Ans. There is a little of the machinery can be used again—that is, a few of the stones could be used, but the iron work and machinery could only be used for old iron. Some of the timber, perhaps, might also be used, but that would depend upon circumstances. It is strong and good inside.

Ques. How much stone is there, and what is it worth over and above the expense of getting it out and ready for use in the new building?

Ans. Not over two or three hundred dollars. I mean, when, speaking of stones, the burrs or millstones.

Ques. How many burrs are there now, and what is their condition?

537 Ans. I think there are two pair of good burrs, and one pair is not a good pair; it is a nigger-head stone, American make.

Ques. Over and above the expense of tearing down and removing the building *the building* what would the timber which could be used over again be worth?

Ans. I couldn't give an idea.

Ques. If this mill and machinery were in good repair and condition and in fair running order—that is, the necessary machinery of the kind heretofore used in the mill, for a mill running four run of burrs—what would the mill and machinery be worth?

Ans. It would be worth in the neighborhood of $15,000.00.

Ques. In your estimate of the value of this property, what value have you given to the small strips and pieces of land included in it? State the value of each piece separately.

Ans. No. 3 I value at $1,200—that is, No. 3 on the map in evidence; $1,000 for No. 4 on map, and $600 to $800 for the strip between the St. Joseph road and the river, or rather between the road and the head race and river.

Ques. What value did you place upon the mill and machinery?

Ans. About $3,000.00.

Ques. What value did you put on the water power, including the dam and appurtenances?

Ans. Well, I should put it from $18,000 to $20,000.

538 Ques. Is there anything else that you took into consideration in estimating the value of the property?

Ans. No, sir.

Ques. Do you know how much available water power, outside of the water rights of the canal feeder, belongs to this mill property?

Ans. I do not know; sometimes there is more and sometimes less, but there is always some, except in very dry seasons. I could not positively state how much power there is.

Ques. How much did you estimate it at in arriving at your estimate of the value; or did you not make an estimate of the amount of power?

Ans. I estimated it as *as* much as ours at the city mill, and I think it is as much now and perhaps more.

Ques. State fully and particularly the facts within your cognisance upon which you base your estimate.

Ans. I have no particular facts, but it is from the appearance of the power as it looks now.

Ques. Is it not a fact that you have water power furnished for
four run of stone at full capacity, running day and night, without
any expense for repairs of water power, within a block and a half
of the court-house in the city of Fort Wayne and adjacent to the
track of an east and west trunk railway, for the sum of $1,800
539 per annum, and that for any failure or lack of use of the
full power a *pro rata* deduction is made from your annual
rental?

Ans. We have power for only three run of stone; we have to keep up our head race and a large culvert under the street for a tail race, and a very expensive water-wheel. As far as the railroad is concerned, it is near the mill.

Ques. With these exceptions, the assumption in my former question is correct, is it not?

Ans. Yes.

Ques. Did you reckon the expense of a water-wheel in your estimate of the Rudisill power?

Ans. No; I merely stated what expense we had in connection with our water power.

Ques. Is it not a fact that your mill is located in as convenient a spot for all the farmers from all directions around the city as is possible to find, and within two squares of those portions of the two main avenues of the city where farmers come with their grain to find a market?

Ans. Not from all directions; Mr. Esmond's is situated better than ours on the Bluffton road. Mr. Orff's is better situated for those on that road. In other respects it would be the most convenient mill before the railroad was put there, not since the railroad was put there.

Ques. Your price for water power was regulated before the railroad came, was it not?

540 A. Yes, sir; the railroad came there about seven months ago.

Ques. Have you ever had experience in buying wheat and milling outside of the city or within the city at a distance of one or two miles from the center of trade and transportation, and can you state the advantages or disadvantages of one location like yours at the centre of trade as compared with such other locations away from the center of trade as to cost of wheat and other grain and expense of moving raw material to and manufactured material from your mill, &c.? If so, state what advantage or disadvantage a central location like yours possesses.

Ans. I have never run a mill outside of central locations. The expense of taking to a railroad is a little more. I don't know what other advantages we have. Other mills buy wheat the same as we do.

Ques. Is not your central location very advantageous for retail trade in the city as compared with locations one or two miles out from the city?

Ans. Yes; a little more so.

Ques. Do you mean to say that you have no advantages over an outside mill in the purchase of grain?

Ans. Not at present; no, sir.

Ques. Do you mean to say that after a farmer had come to the grain market near your mill, a miller one to two miles
541 distant could buy his wheat as readily and at the same price as yourselves in competition with you and have it hauled the extra two miles out of town?

Ans. Oh, no; in that respect we would have the advantage, but Mr. Orff would buy the same as we, and some farmers would rather deliver there than to us on account of the railroad.

Ques. Do you not know as a matter of fact that Pfeiffer's mills in Bloomingdale, not as far from the center of the city as Rudisill's mill, have been obliged to pay a cent or more per bushel more for wheat than yourself by reason of their location, except such loads as passed their mill on the way to the city?

Ans. Not over one cent, and only in some cases.

Re-examined by Mr. NINDE:

Ques. You may state what time each year the canal owners have the right to suspend your water.

Objection by Mr. Alden.

Ans. Only when there are breaks in the canal.

Ques. State whether or not there are advantages which mills situated outside of the city have over yours, and, if so, what they are.

Ans. They might here and there catch up loads of wheat farmers bring in and get more grist work.

Recross-ex.:

542 Ques. Do you mean to say that the canal owners have the power to shut off your water when there is a leak in the canal without any deduction from the annual rental under your contract?

Ans. They have, one month in each year.

Ques. Do you mean to say that grist work is more profitable than other business in the mill?

Ans. I don't think there is much difference, only grist work is always sure.

Ques. Is it a fact that you ever paid $1,800 rent for your mill power in any one year?

Ans. No.

Ques. Is it not a fact that you have deducted at the rate of $1,800 per year for every day and part of day when the power was shut off or you did not yourself use it, and for every failure of full head of power *pro rata* from your annual rental?

Ans. I think that we deducted for every day's stop for the last two years, about; would have to consult my books to say positively, except the last six months, which we paid in full, and the six months previous, not paid at all.

Ques. Is it not a fact that, aside from this water power, you have had the use of two valuable lots in the centre of the city and a tail race extending to the river for the annual rental of $1,800.00?

543 Ans. Yes, sir.

Ques. Have you had any knowledge of or anything to do with any other water power than the one you use here in the city?

Ans. No, sir.

CHRISTIAN TRESSELT.

Testimony of HENRY VIOLAND on the part of Messrs. Bass & Simons, who, being duly sworn, testified as follows:

[Ques.] State your name, age, residence, and occupation.

Ans. Henry Violand; 55 years old; residence, Fort Wayne, Allen county; occupation, miller and mill owner for the last thirty years.

Ques. Are you acquainted with the St. Joseph mill property in litigation, and are you acquainted with the value of mill property in general, and especially of this mill?

Ans. Yes, sir.

Ques. You may state, if you know, the value of piece No. 4, as marked on the map in evidence; the strip of land lying between the St. Joseph road and the St. Joseph river, extending from the Wells reserve line to the St. Joe turnpike bridge, north of the dam; the Rudisill mill and machinery, water power, dam, head and tail race and appurtenances thereto.

Ans. The value of that property is $10,000.00.

Ques. What connection, if any, have you had with this St.
514 Joseph mill property, and how thoroughly are you acquainted
with it and for how long a time?

Ans. I have run that mill for the last two years; am as well acquainted as a man could get for being in it for two years.

Cross-ex. by Mr. NINDE:

Ques. What have you been doing in the mill for two years?

Ans. I have been putting it in some order to run her and have been grinding.

Ques. What have you done to it?

Ans. I have dressed up the burrs and put the bolting cloth in order to do work with.

Ques. How many run of burrs?

Ans. Three run; I never used any more.

Ques. Why didn't you use the others?

Ans. The other burr was not in order, and I couldn't put it in order.

Ques. Would you have run the American burr if you could have got it put in order?

Ans. No; if I had a good burr I wouldn't run it, because a good one would do better. If I had had good burrs I would have run them and not run the others.

Ques. How many bushels of wheat can you grind per hour on the good burrs in that mill?

Ans. Five bushels.

Ques. Is that as much as burrs generally grind?

Ans. That is as much as I can grind there for the capacity I have got of bolting apparatus.

Ques. How much will the burrs grind?

545 Ans. From six to eight bushels, according to the wheat.

Ques. Is there water enough now to run four good run of burrs if they were there?

Ans. There is at present.

Ques. What is the defect in the bolting machine, and how much would it cost to arrange bolting facilities for four run of stone?

Ans. Am not acquainted with the price what it would cost. There isn't enough of the bolting apparatus.

Ques. What do you run on, custom or merchant work?

Ans. Custom, altogether.

Ques. Who do you rent this mill of?

Ans. I rent of Mr. Esmond.

Ques. What kind of water wheels are there in this mill?

Ans. A turbine wheel.

Ques. Where have you been exercising your trade during the time you speak of?

Ans. First at the City Mills, then to Wine's mill for Judge Hanna, then to John Orff, then to Comparet's mill a short time, then put in the little mill at Monning's and run it; from Monning's went into this.

Ques. What is the most available wheel for a head such as the Rudisill mill?

Ans. I suppose the proper wheel for there is the turbine.

Re-examined:

Ques. The head of water just now is remarkably good, is it not?

546 Ans. Yes; at present.

Ques. What is the fact whether at certain seasons, owing to freshets and drought, the mill is practically without power?

Objection.

Ans. I don't know.

Ques. Have you run other water-power mills and had much experience with them?

Ans. I have run others and had considerable experience with water powers.

Ques. What is the condition of the Rudisill mill now, and what is it worth alone just as it stands?

Ans. Its condition is bad. It is not worth any more than what it would cost to tear it down.

Recross-ex'd by Mr. NINDE:

Ques. You say these burrs will grind from six to eight bushels per hour; you may state if that is the full capacity of a pair of burrs in good order with good wheels and machinery.

Ans. Yes, sir.

Ques. State whether you have not ground 25 bushels an hour on one pair of burrs at the City Mill.

Ans. I have not that I know of.

Ques. Don't you know 25 bushels per hour have been ground there? If not, how many have you known per hour?

Ans. I have never took particular notice, except in this mill.

HENRY VOLLAND.

JULY 13, 1882.

547 Testimony of ANDREW F. GLUTTING, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation, and whether you are acquainted with the premises represented on the map marked Exhibit A.

Ans. Andrew F. Glutting; 28 years of age; residence, Fort Wayne, Indiana; occupation, real estate and insurance agent for about sixteen months; am acquainted with the premises on map.

Ques. If you have held any office in this county, or been engaged in any of the county offices, state what and for what length of time, and also whether your purchases and sales of real estate have been considerable or not during the time you have been engaged in business.

Ans. I have acted as clerk for the recorder of Allen county from April, 1868, until March, 1873, and have acted as deputy recorder from June, 1876, until March 1st, 1881. My purchases and sales of real estate have been considerable.

Ques. Are you acquainted with the value of real estate in and about the city of Fort Wayne, and especially of the premises included in the map marked Exhibit A?

Ans. I believe I am.

Ques. You may state the average cash value per lot of the lots in Burgess, Zollinger, & Kamm's addition as shown on said map.

Ans. Well, I think if they are sold as unimproved real estate is
sold generally it will average three hundred dollars a lot—
548 that is, one-third cash and balance in one, two, and three
years at six per cent. interest, notes secured by mortgage.

Ques. What is the value per acre, if you know, of piece marked No. 2 on said map?

Ans. Seven hundred dollars.

Ques. What is the value per acre of piece marked No. 1 on said map, and what is the value of piece No. 3 on said map, including the improvements on No. 3?

Ans. A thousand dollars per acre for piece No. 1, and the value of No. 3, including the improvements, eighteen hundred dollars.

Ques. What is the value of piece No. 4 on said map per acre, including improvements?

Ans. Four hundred dollars per acre without improvements. I don't know the value of the improvements.

Ques. What is the value of the portion of the Burgess, Zollinger, & Kamm purchase west of North Barr street and south of the north line of Wells' reserve per acre (No. 6 on map)?

Ans. One hundred and fifty dollars per acre; it is very broken ground.

Ques. Have you known of any demand for property in the neighborhood of Burgess, Zollinger, & Kamm's addition, or have you known of any sales there? If so, state what the fact is as to demand for property in that neighborhood, and what, if any, sales you have made or been knowing to in that neighborhood.

549 Ans. Can't say that I know of any demand from demands made of me. I have made a sale there, last fall, of about three acres—think a little less than three acres—for $2,800.00. It is known as the old tannery property, with an old house and barn; would value the improvements at $500, leaving $2,300.00 for the real estate. This is about 80 rods north of Burgess, Zollinger, & Kamm's addition.

ANDREW F. GLUTTING.

Testimony of Witnesses Produced on Behalf of the Kamms.

JOSEPH BRUDI, of lawful age, being duly sworn, testified as follows:

Examined by S. R. ALDEN:

I reside at New Haven, Allen county, Indiana; my age is 45 years, and am engaged in milling and lumber business; I have been in the milling business for about eight years; am half owner of the New Haven flouring mills.

[Q.] Are you acquainted with the St. Joe mill property, *i. e.*, the flouring mill, water power, and land belonging to said mill site on both sides [of] the St. Joseph river, being the mill property formerly owned by Henry J. Rudisill, located in sections 35 and 36, township 31 north, of range 12 east, in Allen county, Indiana; and do you know the present value of said mill property, and are you acquainted with the value of mills?

Ans. I am somewhat acquainted with the mill and know its value.

550 [Q.] What is the present value of said mill property, including the mill, mill machinery, water power, land, and all appurtenances?

Ans. I figured it up at $13,715.00.

[Q.] What would it be worth if the mill and machinery were in good order and condition; is the mill, as a four-run mill, in good condition, with machinery of the style heretofore used in it in good repair and condition and sufficient for the four run of buhrs?

Ans. It would be worth from $18,000 to $20,000.

Cross-examination:

Q. Did you ever run this mill?

A. No, sir.

Q. What portion of your time during the last 15 years have you spent at this mill?

Ans. I was in once certajnly, and think I was in twice—just called.

Q. When was it, and how long did you stay?

Ans. I was in about two years [ago] and was in about one and a half hours; I was in about twenty years ago; don't know how long I stayed; was passing along and just stepped in.

[Q.] Have you ever seen and examined this mill machinery and appurtenances since those two visits; if so, when and how carefully?

Ans. I examined the mill two years ago—that is, by the miller taking me through—and to-day I was there to examine it; I examined it as carefully as I could under the circumstances; I examined the burrs, the foundations of the mill; I examined 551 the burrs that were not running; some of them were running and I could not examine them; I examined the machinery on all the floors and the main building and the mill-dam; I was not over the land that belonged to it; I could see it where I stood.

JOS. BRUDI.

Testimony of HENRY BURGESS—on the part of the defendants Kamms—who, being duly sworn, testified as follows:

Ques. State your name, age, residence, occupation, and whether you are acquainted with the lands in dispute in this case, which you, Zollinger, & Kamm purchased of Henry J. Rudisill in 1875.

Ans. Henry Burgess; age, 71 years; reside, New Haven, Allen county, Indiana; by occupation a poor country farmer; I know the property in question.

Ques. Are you acquainted with the value of that property and the property adjacent?

Ans. I think I am.

Ques. Have you had any offers for that property lately; if so, what?

Ans. I was offered for the part not laid off in lots $1,000 per acre in $1,000 payments, at six per cent., the purchasers to put on improvements to the value of $20,000.

Ques. Has there been any demand for lots over there lately to your knowledge?

552 Ans. This spring there were parties wanted to know prices, and I asked $800 per lot; they offered $600, but, as I could not give title, I would not sell.

The foregoing questions are at this time objected to by Mr. Ninde, for plaintiffs.

Ques. You may state, if you know, per acre, what the value of the unplatted portion of the Burgess, Zollinger, & Kamm purchase [is].

Ans. It is worth $500 per acre, at any rate.

Ques. What is the value of piece No. 3, as marked on the map heretofore introduced in evidence?

Ans. Worth near to $2,500.

Ques. What, if you know, is the value of the sand and gravel which annually accumulates on that portion of Spy run which crosses No. 2 on the map?

Ans. What they have got there this year is worth $250—worth $250 annually.

Ques. What is the value of piece No. 1, on the map in evidence, per acre?

Ans. $1,000 per acre.

Ques. What is the value per acre of the platted portion of the land you purchased?

Ans. About $1,000 per acre.

Cross-ex. by Mr. NINDE:

Ques. Is not all you know about the values over there impressions you have got from owning and managing your own property?

Ans. Yes, sir.

Ques. Have you any knowledge of any sales in that neighborhood other than your own operations; if so, by whom, and
553 at what rates?

Ans. Mr. Kamm made a sale of two or three lots; I think at $800 per lot.

Ques. Is not the ground lying west of your addition too broken and low for lots and unfit for residences?

Ans. The west part of it is; not very much of it; but little broken ground there.

HENRY BURGESS.

Testimony of ANTON KALBACHER, who, being duly sworn, testified as follows:

Ques State your name, age, residence, occupation, extent of experience, if any, as practical miller, owner, and manager of flouring mills.

Ans. My name is Anton Kalbacher; age, 40 years; residence, Fort Wayne, Indiana; occupation, mill owner and operator; was employed in the Beaver mills and feed store four years—from 1860 to 1864; have owned and run a flouring mill in the city of Fort Wayne for two years last past; have been in the flour and mill-feed business twenty years.

Ques. Are you acquainted with the St. Joe mills and mill property shown on map, marked Exhibit A?

Ans. I am.

Ques. Are you familiar with the value of flouring mills and mill property in general, and the St. Joe mill and mill property in particular?

Ans. Yes, sir.

554 Ques. You may state, if you know, the present cash value of the piece of land marked No. 4 on said map; the strip of land lying between the St. Joseph road and St. Joseph river, extending from the St. Joe turnpike bridge on the north to the north line of Wells' reserve on the south; the mill and machinery located thereon, the dam, head and tail races, water power, and appurtenances thereto connected with said mill property, all taken together.

Ans. I should judge it to be worth from $13,000 to $15,000. I took special pains to examine it myself this morning, and from what I have heard from others I am convinced I am about right in the opinion I formed from that examination.

Ques. What, if you know, is the present cash value of said mill and machinery in the condition it now is?

Ans. At the outside I would not appraise it at more than $500.

Ques. What would this mill and machinery of the kind heretofore used in it, sufficient for four run of buhrs, in good, fair condition, have been worth in January, 1875, with the mill in good condition and repair, *i. e.*, mill and machinery in good condition and repair as a four-run mill of the kind and as this was in 1875?

555 Ans. About $10,000.00.

A. KALBACHER.

Testimony of GEORGE ESMOND, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation, and what experience, if any, you have had as a practical miller, mill owner, and manager of flouring mill.

Ans. Name is George Esmond; age, 39; occupation, mill owner and operator for the last twelve or thirteen years; reside at Fort Wayne, Indiana.

Ques. What mill property do you now own, and where is the same located? Describe it and state how long you have owned it.

Ans. I own the property known as the Esmond mills, on the St. Mary's river, two and a half miles south of the court-house; have owned it since about 1875. This is a brick building, four stories, water power, eight run of burrs, with complete modern machinery.

Adjourned until July 14, 1882.

JULY 14, 1882.

Met and adjourned to Monday, July 17, 1882.

JULY 17, 1882.

Examination of George Esmond resumed.

Ques. State whether or not you hold the legal title to the property known as the Rudisill mills, and have done so since the conveyances to you by John E. Hill and Eliza Rudisill.

Ans. I do and have.

556 Ques. State what was the condition of that property when it came to your hands by those conveyances.

Ans. The mill and dam were both in very bad condition; the dam needing immediate repairs; the head-gates were gone.

Ques. What improvements have been made upon it since?

Ans. New head-gates have been placed in the race, the dam rebuilt, new abutments built, and slight repairs in the mill, such as new bolting-cloth, sufficient to let us do some work.

Ques. State whether or not all the repairs made to the dam and race and about the foundation of the mill were necessary to save the property from danger of destruction.

Ans. They were absolutely necessary.

Ques. How many run of stone are there in the mill?

Ans. Four run.

Ques. Have you been running the mill since it came into your hands?

Ans. Yes.

Ques. To what extent and during how much of the time is the power afforded by the dam sufficient to run the machinery of the mill?

Ans. The machinery there fit to run the power would run, say, ten months in the year, but there is only machinery there enough to run two run.

557 Ques. Has the mill ever run the four run of stone at once since you have had it?

Ans. No, sir; it can only run two run at a time at the best.

Ques. What, in your opinion, is the said mill property, including the dam, race, mill, and contents, and all the ground embraced on this plat, marked No. 4 and 5, worth in cash?

Ans. About $13,000.00.

Cross-ex. by Mr. Ninde:

Ques. What portion of this sum do you take as the value of the mill seat and water power, and what portion do you give to the mill and contents?

Ans. About $12,000 for the water power and ground, and the balance, or $1,000, for the mill and contents, the mill being worthless except as old material.

Ques. Which, in your opinion, is the best power or the most valuable property, without considering the difference in buildings, this mill or your mill?

Ans. I would not consider them very different; the St. Joseph is a little better as to water and my position is a little better.

Ques. Which site furnishes the most power, in your judgment?

Ans. I think the Rudisill's.

Re-ex.:

Ques. State whether or not you have steam power attached to your mill in addition to your water power.

558 Ans. I am now adding steam.

Ques. How much do you consider your water power worth, apart from your building and machinery?

Objected to by Mr. Ninde as immaterial.

Ans. About $10,000.00.

GEO. ESMOND.

Testimony of Levi M. Jones, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation, and how long and to what extent you have been engaged in your present business.

Ans. Name is Levi M. Jones; age, 42; residence, Fort Wayne, Indiana; in real estate business for about fifteen years.

Ques. You have in your hand a map showing the property known as the Rudisill mills, and the Burgess, Zollinger, & Kamm addition, and some parcels of land adjoining them. You may state whether or not you are acquainted with that property and its situation and with its value. (Map, Exhibit A, shown.)

Ans. I am.

Ques. You may state what, in your opinion, is the fair cash value of the property embraced in the Burgess, Zollinger, & Kamm addition.

Ans. It would average from $200 to $250 per lot.

Ques. What is the fair cash value of the parcel marked No. 2 on said map?

559 Ans. I should put that at about $900 per acre.

Ques. You may state the value of parcel marked No. 6.

Ans. $200 for the piece. I think it is a wet piece of ground.

Ques. You may state what is the value of parcel marked No. 1.

Ans. I think it is worth $500.00.

Ques. Are you familiar with the parcel marked No. 3, and the improvements?

Ans. I don't know certainly as to improvements; know the lot; think it is a two-story house.

Ques. From what you know of it, state its value, in your opinion.

Ans. I should put it at about $1,800.00.

Examined by Mr. ALDEN on behalf of defendants Kamms:

Ques. What is the value per acre of No. 5 on the map?

Ans. I would put that at $400 per acre.

Ques. What is the value of No. 4?

Ans. I should put that at $500 per acre.

Ques. What is the value of those portions of lots 105 and 106, original plat of Fort Wayne, described in the trust deed executed by J. H. Barnett to George P. Bissell, dated July 15, 1869, being the twenty-foot lot and improvements south of and adjoining the north thirty feet of said lot 106 on Calhoun street, in said city, and all that part of said lot 105 not embraced in the ten-foot alley between 105 and 106?

560 Ans. I should think the Calhoun-street property worth $400 per front foot, and I should think the Fruit-House property, being part of lot 105, worth $250 per front foot.

Ques. State what the fact is about the length of time you have been in the real estate business in Fort Wayne, and whether you are acquainted with the value of property generally in and about said city.

Ans. About eight years. I think I am familiar with the values of property about here.

LEVI M. JONES.

Testimony of JOSEPH W. EDSALL, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, and occupation, and what experience, if any, you have had in real estate business.

Ans. Joseph W. Edsall; age, 28 years; residence, Fort Wayne Indiana; occupation, real estate and insurance agent in and about Fort Wayne for about five years.

Ques. Are you familiar with real estate and its values in general in and about the city of Fort Wayne, and especially with the property shown on map marked "Exhibit A," attached to this examination?

Ans. Yes, sir.

Ques. Do you know the cash value of the real estate shown on said map other than the mill and appurtenances?

561 Ans. As far as the cash value is concerned, in my opinion, it would be a pretty difficult thing to give as to that or any other property.

Ques. Taking into consideration your knowledge of the real estate market in and about Fort Wayne, can you state the value of the the land in Burgess, Zollinger, & Kamm's addition and adjacent thereto?

Ans. Yes, sir.

Ques. State the average value per lot of the lots in Burgess, Zollinger, & Kamm's addition.

Ans. $250 a piece; that is on the basis of an ordinary real estate transaction, one-third cash, balance in deferred payments, six per cent. interest, evidenced and secured by note and mortgage.

Ques. State the value per acre of piece marked No. 1 on said map, and also of piece marked No. 2 on said map.

Ans. Of No. 1, $1,000. Of No. 2—the portion of No. 2 west of Spy run I consider worth $2,000; the part east of the run I would put at $1,500.

Ques. You may state the value of piece marked No. 3 on the map.

Ans. $2,100 to $2,200, along there; think it safe to say $2,100.

Ques. State, if you know what the fact is, whether or not real estate in and adjacent to Burgess, Zollinger, & Kamm's addition has increased or decreased in value since 1875.

Ans. That is before I went into real estate business and don't know much about values.

Ques. Since 1877 to this date, state whether it has increased or decreased, if you know.

562 Ans. It has increased a little since 1877.

Ques. What per cent. of increase since 1877?

Ans. About forty per cent.

Cross-ex. by Mr. Ninde:

Ques. What, in your opinion, would be the cash value of the premises described in the J. H. Barnett mortgage west of Spy Run avenue? I refer to the premises enclosed in red lines on the map, but west of the avenue. I desire your opinion upon a cash value at a public sale on three weeks' notice.

This last part of the question objected to.

Ans. As I said before, it is [a] pretty hard thing to get a cash value on those premises; it would depend entirely upon how it would suit any particular man to whom it would be offered; it would probably bring $10,000.

Ques. Is it not true that there is a vast quantity of such real estate in and about said city, laid off and not laid off, that is just as saleable as this is, but for which there is no market sale at any such prices as that you put upon this tract?

Ans. No, sir; I don't think there is.

Ques. Is not real estate and suburban lots outside of the limits of the city of Fort Wayne dull sale for cash?

Ans. Not necessarily; no, sir.

Ques. What amount of lots have you for sale outside of the city limits, or strictly suburban property within the limits?

Ans. That I could not say or even give an idea of without examining my register.

563 Ques. Have you as many as a thousand, according to your best impression?

Ans. I do not know as I have that many on the books, but, including what I have on the books and carry in my mind of those I have been told to see if I can, I suppose I have that many.

Ques. Are the prices at which they are offered for sale by you about in the same proportion, in view of the various locations and characters of the various pieces, to the prices you have put on the property in controversy?

Ans. Yes, sir.

Ques. You may state what amount in value you have sold within the last 30 days.

Ans. The fact is there has been very little sold in the last 30 days; this is the season when there is very little property sold; I have probably sold three or four.

Ques. How many have you sold in the last 60 days?

Ans. That I can't state.

Ques. Have you sold a dozen lots in the last 60 days?

Ans. No, sir.

Ques. Have you sold a dozen lots in the last 90 days?

Ans. I don't suppose I have.

Ques. State if it is not true, in your opinion, that there is no reliable or certain market for this property in cash at any such
564 price as this you have placed upon it, either in bulk or as divided.

Ans. That is all owing to whether a man comes along who wants property of that kind. You might offer to a dozen parties and not sell and might offer to one and sell right away. In real estate there is nothing sure until you close the sale.

Ques. I am not asking your opinion of the cash value of this property upon a possible customer that might happen to desire it; but I will ask you to state whether in your opinion it would bring in cash over from two to three hundred dollars per acre upon an absolute cash sale made in the market as it is.

Ans. Yes, sir; it would.

Ques. Then state what in actual cash, without waiting for a custumer, said property would in your opinion bring per acre.

Objection by Mr. Alden.

Ans. About $700 per acre.

Re-examined:

Ques. State what the fact is as to whether real estate is sold in the ordinary course of business in and about Fort Wayne for cash in hand, except in very rare instances.

Ans. No, sir; it is not.

Ques. What are the usual terms of sale?

Ans. From one-third to one-half cash; balance in one and two years, at six per cent. interest, with notes payable in bank and secured by mortgage.

565 Ques. State whether or not it is upon the basis of sales upon the terms mentioned that values are ordinarily estimated in practical transactions.

Ans. Yes, sir; it is.

Ques. You may state how much, if any, difference there would be in your opinion between values of the property stated by you to be sold upon the terms stated and the values of the same pieces sold for cash at a fair, voluntary sale, neither party being under compulsion to buy or sell.

Ans. I don't know as there would be any difference where there was no compulsion on either side.

J. W. EDSALL.

Testimony of JOHN ORFF, who, being duly sworn, testified as follows:

Ques. State your name, age, residence, occupation, and the length of time you have been engaged in that occupation.

Ans. My name is John Orff; residence, Fort Wayne, Indiana; age, 61 years; miller and mill owner for 28 years.

Ques. Where is the mill which you have owned and operated, and by what sort of power has it been propelled?

Ans. It is located at the west end of Main street, Fort Wayne; propelled by water and steam; a grist and flouring mill. It has been run by water whenever there was a surplus of water in the canal while it was navigable. It probably has not been run by steam to exceed 2½ years altogether.

566 Ques. How long since the mill was built and how long was it propelled by water before any steam engine was attached?

Ans. The mill was completed in 1843 by Samuel Edsall, nearly forty years ago. I bought it in 1854 and run it since, and put in steam about twelve years ago, when the water got so we could not run it after harvest. It was run about 14 or 15 years by me without steam.

Ques. You may state whether you are acquainted with the water power and grist-mill on the St. Joseph river known as the Rudisill mill, and, if so, whether you are acquainted with its value, and what it is.

Ans. I am acquainted with it. I don't know as I could say I am thoroughly acquainted with its value, for that is hard to tell. I have a value I could put on it myself. Its value is not to exceed $15,000. I put its value at that—$15,000.

Ques. In that estimate what do you include as constituting the entire property?

Ans. I include the mill building and its contents, the land property on each side for the safety of the dam and the race.

Cross-ex. by MR. NINDE:

Ques. What do you put the mill and its contents at?

Ans. One thousand dollars.

Ques. Have you ever owned or used or have you given any continued attention to the amount of water power this site furnishes?

567 Ans. I did not own or use this property. I have given

attention to the water power, so as to satisfy myself as to the amount.

Ques. What do you estimate that this power will amount to for six of the best months of the year, estimating by runs or burrs of stone?

Ans. It will run about four run during the six best months; not over two for the next six months.

Ques. Suppose, upon actual test, the average years would produce power enough to run six run of stone six months in the year, and four run for four months more, and two run for the rest of the year, what difference would it make in your estimate of the value of the power?

Ans. Forty per cent. increase—that is, of the power alone.

Re-examined:

Ques. How many run of stone are there in the mill?

Ans. Four.

Ques. Have there ever been any more?

Ans. No, sir.

Ques. Do you know whether the power has ever been sufficient to propel those four at once for any considerable time?

Ans. It has not. I do not think they have ever run more than three.

Recross-ex. by Mr. NINDE:

568 Ques. Do you mean to say that, according to your information, they have not run more than three, or that, from your knowledge of the water power, it would not run more than three in a well-constructed mill?

Ans. The water power will run four for a short time, and then will recede and only run three; there is only a little time when it will run four run of stone.

Ques. If you have never used this power or been about it for any length of time how have you ascertained the knowledge of the exact flow of water? Don't you depend largely upon hearsay for your opinion?

Ans. I have been very much interested in this water power; taking the water from the canal feeder and getting short very often we made inquiries as well as examination of the tightness of the feeder dam, so as to get a supply if it was permitted to be wasted over the dam; therefore we have come in direct contact with this power, obtaining full information of the whole of it, getting nothing from hearsay or other information.

JOHN ORFF.

Cross-examination of ANTON KALBACHER by Mr. NINDE:

Ques. Have you ever had any experience in using water power in the manufacture of grain?

Ans. Not for myself, but I worked in a water-power mill at Beaver's; simply worked as a general hand about the mill and store; only in the mill part of the time. 569

Ques. Have you any knowledge as to the amount of power it takes to run a pair of merchant burrs?

Ans. About a twenty horse power; as to water power I don't know.

Ques. Do you know anything about the amount of water it takes to run a pair of burrs under the head they have at Rudisill's mill?

Ans. No, I do not.

Ques. Do you know anything about what amount of water power they have at said mill during the various portions of the season?

Ans. No.

Ques. What is power sufficient to run a pair of merchant burrs to the best advantage worth?

Ans. Mine costs me 2¼ dollars per day of twelve hours; it is worth that.

Ques. What proportion of power does your mill take compared with the City Mills?

Ans. Can't tell exactly; very near as much. Never run big burrs and can't tell.

Ques. Now, you have spoken of the cost of the power, you may state whether it is not worth more than that to have it.

Ans. I should think it would be worth a little more.

570 Ques. Now, if a power is worth from 4½ dollars upwards for 24 hours, what would the Rudisill mill power be worth provided there is water enough to run six run of stone for six months in the year, and enough to run four run the next four months and two run for the rest of the time?

Ans. I should think such a power would be worth $1,200 per year.

Ques. At $2.50 per power, wouldn't six run of stone be worth $15.00 per day?

Ans. I suppose it would be.

Ques. You say $2.25 for the power of two run of stone; what do you spend that for?

Ans. Fuel and man.

Ques. Well, sir, a power that is worth $15.00 per day clear, wouldn't it make over $2,000 in six months?

Ans. Yes.

Ques. And the half of that in the other six months, on the theory I put?

Ans. Yes, sir; on your calculation.

Ques. Upon a power that is worth as much as you say in net value per day, or per year, what would it be worth per year, or what would it make?

Ans. I couldn't tell; a power is not at all times profitable to him.

Ques. Would not this mill property be worth from $20,000 to $25,000 if it would run six run of stone for six months, four run for three months, and two run for three months, or, what is the same thing, three run for the other six months?

571 Ans. No, sir; I should judge it to be worth from $14,000 to $15,000.

Ques. How do you make up your judgment as to value? State fully how you calculate it.

Ans. I calculate nearly altogether on the power; I calculate what the mill would cost and what it would make, and in valuing it at $15,000 I estimate it would hardly pay an interest on that amount.

Ques. Is that all the explanation you can give of your estimate of the value of that water power?

Ans. Yes.

Re-examined:

Ques. State whether or not the true test of the value of any motive power applied to the manufacture of wheat is not the number of barrels of flour which it will make in a given time rather than the number of stones it will run.

Ans. As far as I know it is.

Ques. Do you know how many barrels of flour can be made upon the Rudisill mill as it now is per day?

Ans. I think about twelve barrels in a day of twelve hours.

Ques. You may state what improvement would be necessary in order to make available and profitable the full power of the water in the manufacture of good merchantable flour at that mill.

Ans. Would have to have a new mill.

572 Ques. Do you know how much it would cost to build such a mill?

Ans. I do not know.

Ques. Is it possible to make good merchantable flour at that mill as it is now?

Ans. No, sir.

A. KALBACHER.

GEORGE ESMOND resumed:

Ques. State whether you have examined into the question of the estimated cost of steam power per barrel in the manufacture of flour; if so, state what it is as generally understood by millers and experts.

Objection by Mr. Ninde.

Ans. I have, and it is understood to be from five to eight cents per barrel; the best class of builders will guarantee their engines to make a barrel of flour with twenty pounds of coal.

Ques. State whether or not the true measure of the value of any motive power, when applied to the manufacture of flour, is not the number of barrels which it will make in a given time.

Ans. It is.

Ques. How much flour and of what quality can be made in the Rudisill mill as it now is at the best stage of water?

Ans. About one barrel per hour and of very poor quality; hardly *inspect* family.

573 Ques. What additions or alterations would be necessary at the Rudisill mill in order to utilize the full power of the water in the manufacture of first-class flour?

Ans. In my opinion an entirely new mill would be the cheapest and best alteration.

Ques. State whether or not you have made or caused to be made any estimates of the cost of such a mill; and, if so, what is the result?

Ans. I have; it would cost from $25,000 to $30,000.

Ques. Assuming the water power to be worth $12,000 and the cost of a new mill to be $30,000 we have an investment of $42,000 as necessary to utilize the power. Is that correct?

Objection by Mr. Ninde.

Ans. Yes, sir, except that a working capital in addition would be required.

GEO. ESMOND.

ANDREW F. GLUTTING cross-examined by Mr. NINDE:

Ques. Is there not a vast amount of property, what is known here as outside property, within and without the city limits of Fort Wayne, both laid out and not laid out, in the shape of town lots and outlots for sale?

Ans. Yes, sir.

Ques. Is there not more of such property than the market will
absorb in the next ten years? If not, specify what proportion
574 will find market in the next five and ten years.

Ans. No; I don't think there is more than will be absorbed in ten years—that is, as close to the city as that is: I think that property at the prices I put on it can be sold in the next two years, if not less.

Ques. At what rate can it be sold for cash in your opinion—on a notice of thirty days? State each piece separately, and state the price per acre.

Objection by R. S. Taylor.

Ans. I do not know what it could be sold for on those conditions.

Ques. Is it your opinion that upon a thirty days' notice for cash the property included in the red lines on the map, being that covered by the J. H. Barnett mortgage, could be sold for over $300 per acre in cash?

Ans. Yes, sir.

Ques. State how much more.

Ans. I think it would sell for $500 more than that—$800 per acre.

ANDREW F. GLUTTING.

Plaintiff and defendants both rest.

I certify that the above and foregoing is a full, true, and correct report of all the testimony produced before me as special commissioner in the above-entitled cause.

R. S. ROBERTSON.

And thereupon said master is discharged from the further 575 consideration of the matters so referred. And on motion the court doth now allow him the sum of one hundred and twenty-five dollars for his services herein, to which the parties do now here agree.

And George H. Wilson, receiver, also files his report in these words, to wit:

George H. Wilson, heretofore appointed receiver in said cause, reports to the court the following statement of expenditures made by him since his last report:

He has expended in repairs upon the dam, race, and forebay upon said Rudisill mills property the sum of $1,375.89, for which he files vouchers as follows:

Brown, Howard & Co.	$836 37
O. A. Simons	539 52
	$1,375 89

Said receiver reports further that said repairs were principally upon the apron of the dam, where the water was undermining the same, and upon the head race, where an eddy was rapidly cutting away the bank.

Said receiver reports further that all said repairs were necessary and indispensable for the protection of said dam, race, and mill from danger of undermining and destruction by flood, and that delay in the making of such repairs would have been hazardous, and that in said expenditures he has gone no further than the immediate safety of said property in his judgment required.

576 The money so expended was advanced by Oscar A. Simons and John H. Bass as mortgagees, and the details of the work were under the personal superintendence of Oscar A. Simons.

GEO. H. WILSON.

Subscribed and sworn to before me this 14th day of December, 1882.

NOBLE C. BUTLER, *Clerk.*

And afterwards, to wit, at the term of said court first aforesaid, on the 14th day of December, A. D. 1882, before the Honorable Walter Q. Gresham, judge, as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and the court, being fully advised in the premises, doth now here pronounce the following order, findings, and decree in said cause—that is to say:

It is first ordered, adjudged, and decreed by the court that the interlocutory findings and decree made and entered in this cause on the tenth day of February, 1881, be, and the same are hereby, vacated and set aside, as well as any and all other decisions, findings, and orders hereinbefore made which are contrary to the final findings and decree now here pronounced and entered.

And thereupon it is found by the court that John H. Barnett and

Abraham G. Barnett on the 15th day of July 1869, executed
577 to George P. Bissell & Co. their eight (8) coupon bonds for the
sum of one thousand dollars ($1,000) each, payable in ten years from said date, with interest, payable semi-annually, at the rate of nine per cent. per annum, as represented in the interest coupons to said bonds attached; that on the same day aforesaid said John H. Barnett executed to the plaintiff a deed of trust and mortgage to secure the payment of said bonds, conveying to him for that purpose the lands therein and hereinafter described, which bonds and deed of trust and mortgage are fully set out in the plaintiff's bill of complaint; that default has been made in the performance of the conditions of said bonds and mortgage, and there is now due and payable to the plaintiff as such trustee, for principal, interest, and attorney's fees, payable by the terms of said bonds and mortgage, the sum of eleven thousand six hundred and eighty-three dollars and 04 cents ($11,683.04), for which the plaintiff is entitled to payment and foreclosure of said mortgage.

And it is further found by the court that the defendant, Henry J. Rudisill, for a good and sufficient consideration, assumed the payment of the principal and interest of five of said coupon bonds and executed to said John H. Barnett his bond in the penal sum of ten thousand dollars ($10,000) for the performance of such agreement, dated on the 15th day of July, 1869, and also his mortgage, in which his wife, Elizabeth E. Rudisill, joined, dated on the
578 13th day of December, 1871, and conveying to said John H.
Barnett, as such security, the lands therein and hereinafter described, which bond and mortgage are also fully set out in the plaintiff's bill of complaint and also in the cross-bills of the defendants Barnetts, Shoaff, and Wall.

And it is further found by the court that said John H. Barnett died on the 23rd day of January, 1872, having, by his last will and testament duly executed, appointed said Abraham G. Barnett his executor and trustee of his estate; which will was duly admitted to probate, and by authority of which the said Abraham G. Barnett proceeded to and did exercise the functions of executor and trustee in the settlement of the estate of said John H. Barnett, without, however, giving bond, or taking any oath, or receiving any letters testamentary as such executor.

And it is further found by the court that said Henry J. Rudisill, on the 23rd day of January, 1875, sold to Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm part of the lands described in the mortgage theretofore executed by him to John H. Barnett, as aforesaid, the said lands so conveyed being fully described in the cross-bills of the defendants Simons, Burgess, and Bass, and Kamm, and hereafter in this decree; that at the time of said sale, and before the execution of said deed, said Abraham G. Barnett entered upon the record of the mortgage executed by Henry J. Rudisill to
579 John H. Barnett, as aforesaid, a release and satisfaction
thereof as to the lands so sold, and received from said Henry J. Rudisill, in lieu and stead of the security so relinquished, a mortgage executed by the said Henry J. Rudisill and Elizabeth E. Rudi-

sill, his wife, dated the 23rd day of January, 1875, and conveying to said Abraham G. Barnett the lands therein and hereinafter described as security for the performance of the same bond from Henry J. Rudisill to John H. Barnett, hereinbefore mentioned, which mortgage is fully set out in the plaintiff's bill of complaint, as well as in the cross-bills of Simons, Bass, Burgess, and the Kamms; that said release was entered upon the record, as aforesaid, for the purpose of enabling said Rudisill to convey to the purchasers aforesaid an unencumbered title to the lands so released; that upon the faith of such release such purchasers took a conveyance of the lands so released and paid full value therefor in cash, and that the defendants Simons, Bass, Burgess, Hoffmeister, McCurdy, Hattersley, and the Kamms are now the owners of the lands so conveyed to Burgess, Zollinger, and Kamm, as aforesaid, and that as such owners they hold said lands discharged of the lien of said mortgage executed by Henry J. Rudisill to John H. Barnett, as aforesaid.

And it is further found by the court that on the 30th day of October, 1860, said Henry J. Rudisill and Elizabeth E. Rudisill, his wife, executed to Elizabeth Rudisill, mother of Henry
580 J. Rudisill, a mortgage conveying to her the following lands to wit: The south half of the northeast quarter, containing fifty-seven and $\frac{36}{100}$ (57.36) acres, and the north half of the southeast quarter, containing fifty-eight and $\frac{12}{100}$ (58.12) acres, and the southeast fraction, containing twenty and $\frac{22}{100}$ (20.22) acres, all in section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, in Allen county, in the State of Indiana, saving and excepting therefrom all that part of said premises lying south of a lane running westerly from the mill thereon and west of the St. Joseph State road as now travelled, supposed to contain about seven (7) acres; and also saving and excepting therefrom that portion of said premises heretofore sold and conveyed to Henry C. Gray, Maria C. French, and Julia A. Freeman to secure the payment of an annuity by said Henry J. Rudisill to said Elizabeth Rudisill, his mother, of eight hundred dollars ($800) per annum during her natural life, payable in quarterly installments of two hundred dollars ($200) each on the first days of January, April, July, and October in each year, which mortgage is fully and truly set out in the cross-bill of the defendants, Simons and Bass; that since the commencement of this suit said Elizabeth Rudisill assigned said mortgage and all unpaid installments of annuity due thereon to the defendants, Simons and Bass; that there is due upon said
581 annuity mortgage for unpaid installments of annuity and interest thereon seven thousand five hundred and forty-five dollars and 45 cents ($7,545.45), and that the present value of said annuity is three thousand five hundred and eighty-seven dollars, making in all the sum of eleven thousand one hundred and thirty-two dollars and 45 cents ($11,132.45), which the defendants, Simons and Bass, as assignees of said annuity mortgage, are entitled to receive in satisfaction thereof, and for which they are entitled to foreclosure thereof.

And it is further found by the court that said Simons and Bass have advanced, as mortgagees, the sum of $4,227.75, which has been expended under the order of this court in repairs necessary for the preservation and protection of the dam, race, and mill situated on part of the property described in said annuity mortgage, for which, with interest, amounting in all, at this time, to four thousand five hundred and forty-eight dollars and seventy cents ($4,548.70), they are entitled to a prior lien upon the property for the benefit of which it was expended.

And it is further found by the court that at the time of the sale by said Henry J. Rudisill to said Burgess, Zollinger, and Kamm, as aforesaid, said Elizabeth Rudisill released her said annuity mortgage in favor of said purchasers as to the lands sold and conveyed to them, and that the present owners of said lands, herein-
582 before named, hold the same free from the lien of said annuity mortgage.

And it is further found by the court that said annuity mortgage is the first lien upon all the lands described in said mortgage executed by said Henry J. Rudisill to John H. Barnett which were not conveyed to Burgess, Zollinger, and Kamm, except the following, to wit: A triangular tract in the southeast quarter of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, in Allen county, in the State of Indiana, bounded on the north by Burgess avenue, on the west by North Lafayette street, and on the southeast by the centre line of the old Bloomingdale road, as formerly used.

And it is further found by the court that said sum advanced by said Simons and Bass, as aforesaid, is the first lien, and the said annuity mortgage the second lien, upon all the lands described in the said mortgage executed by Henry J. Rudisill to Abraham G. Barnett, as aforesaid, except the following, to wit: Beginning three chains and forty-six links (3.46) south of the east quarter-post of section thirty-five (35), township thirty-one (31) north, of range twelve east, at a stone; thence four degrees (4°) east eight chains to the line of low-water mark; thence south thirty-nine degrees (39°) east five chains (5.00); thence south seventy-four degrees east three (3) chains; thence north eighty-two degrees east six chains and twelve links (6.12;) thence north twelve and one-fourth [degrees] (12¼°) east one chain
583 and forty-five links (1.45) to a stone; thence north sixty-five and one-half degrees west eleven chains and fifty links (11.50); thence north twenty-three and one-half degrees west six chains and ten links (6.10) to the place of beginning; containing five acres and $\frac{47}{100}$ (5.47), more or less, in Allen county, in the State of Indiana.

And it is further found by the court that five-eighths (⅝th) of the sum found due to the plaintiff, as aforesaid, is primarily due and payable by said Henry J. Rudisill, and that the defendants, Barnetts, Shoaffs, and Walls, are entitled to have the lands described in the mortgage executed by said Henry J. Rudisill to John H. Barnett, as aforesaid, except that part of the same sold to Burgess, Zollinger, and Kamm, as aforesaid, and all the lands described in the mortgage executed by said Rudisill to Abraham G. Barnett as aforesaid sold and exhausted to make said five-eighths ($\frac{5}{8}$th) of said sum due the plaintiff before sale for that purpose of any of the lands described in said mortgage executed to the plaintiff.

And it is further found by the court that the equity is with the defendants, Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Oscar A. Simons, and John H. Bass, on their answers and cross-bills, and that they and each of them are entitled to have their title quieted in them 584 as against the plaintiff, George P. Bissell, and their co-defendants, Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, Byron Hueston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, Mary Ann Wall, and Watson Wall, and all persons claiming under, by, or through them, to the lands conveyed to Henry Burgess, Charles A. Zollinger, and Jacob J. Kamm by Henry J. Rudisill and wife on the 23rd day of January, 1875, described particularly hereinafter and in the cross-bill of Burgess and the Kamms.

And it is therefore ordered, adjudged, and decreed by the court that said Abraham G. Barnett do pay within ten days to the clerk of this court for the use of the plaintiff said sum of eleven thousand six hundred and eighty-three dollars and 4 cents ($11,683.04) found due as aforesaid, and that said Henry J. Rudisill do, within ten days, pay to the clerk of this court for the use of the defendants, Oscar A. Simons and John H. Bass, said sum of eleven thousand one hundred and thirty-two dollars and 45 cents ($11,132.45) found due on said annuity mortgage as aforesaid, and that upon default of such payments the clerk of this court shall issue and deliver to John W. Hayden, who is hereby appointed a special commissioner for the purpose of receiving and executing the same, a certified copy of this decree, under the seal of this court, and a proper precept of sale, upon which the said commissioner shall levy the same on all the lands hereinafter ordered to be sold, and 585 advertise the same for sale at the court-house door in said county, as required by the statute law of the State of Indiana in the sale of lands upon execution, and shall, at the time and place named in such notice, sell said lands, as lands are sold upon execut*ed* at law, in the order hereinafter stated, and apply the proceeds thereof as hereinafter directed—that is to say:

There shall be sold first the lands described in and still subject to the lien of said annuity mortgage, but not embraced in any of the other mortgages referred to in the foregoing findings, the same being described as follows: Beginning at the intersection of the center of Spy Run avenue and the St. Joe turnpike, in section thirty-five (35), township thirty-one (31) north, of range twelve (12) east, in Allen county, Indiana; thence northerly along the center line of Spy Run avenue to the southeast corner of a three-acre tract of land, sold by Henry Johns to Henry Gray, on the west bank of the St. Joseph river; thence along the bank of said river, with the meanderings thereof, to the south line of the north half of the northeast quarter of said section thirty-five (35); thence northerly across the river to

the north corner of that portion of said section thirty-five (35) east of the St. Joseph river; thence southerly along the bank of said St. Joseph river, with the meanderings thereof, to the southwest corner
of a tract of land sold by Henry J. Rudisill to Nicholas Hu-
586 bertus and wife; thence southeast to the east quarter-post of
said section thirty-five (35), being also the center of the St. Joe turnpike; thence westerly along the center of the St. Joe turnpike to the place of beginning; and the proceeds of such sale shall be applied upon said sum of $11,132.45 found due to Simons and Bass upon said annuity mortgage.

There shall be sold next the lands embraced both in said annuity mortgage and said mortgage executed by Henry J. Rudisill to Abraham G. Barnett, the same being described as follows: All that tract of land known as the St. Joe mills property, in section thirty-five (35), township thirty-one (31) north, of range twelve (12) east, in Allen county, Indiana, commencing at the point where the north line of Wells' pre-emption intersects the center line of Spy Run avenue, formerly known as the St. Joe road; thence northerly along the center line of said avenue to the point where the center line of the St. Joe turnpike intersects the same; thence easterly along the center of the St. Joe turnpike to the east quarter part of said section thirty-five (35); thence south along the east line of said section to the St. Joseph river; thence down said river, with the meanderings thereof, to the said north line of Wells' pre-emption; thence west along said line to the place of beginning, being all of the property conveyed by Henry J. and Elizabeth E. Rudisill to Abraham G. Barnett by mortgage, dated January 23rd, 1875, except 5 and $\frac{47}{100}$ acres con-
veyed to Henry J. Rudisill by Samuel and Eliza Hanna by
587 deed dated November 20th, 1861. And the proceeds thereof
shall be applied, first, to the payment of said sum of four thousand five hundred and forty-eight dollars and 70 cents ($4,548.70) found due to Oscar A. Simons and John H. Bass as aforesaid for moneys advanced by them for repairs; second, to the payment of said sum of eleven thousand one hundred and thirty-two dollars and 45 cents ($11,132.45) found due to said Oscar A. Simons and John H. Bass, as assignees of said annuity mortgage; and, third, to the payment of five-eighths (⅝ths) of said sum of eleven thousand six hundred and eighty-three dollars and 4 cents ($11,683.04) found due the plaintiff as aforesaid, and the surplus, if any, to the defendant, George Esmond.

There shall be next sold the lands embraced both in said annuity mortgage and said mortgage executed by Henry J. Rudisill to John H. Barnett as aforesaid, exclusive of the lands conveyed to Burgess, Zollinger, and Kamm as aforesaid, the lands so to be sold being described as follows: That part of the southeast quarter of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, in Allen county, Indiana, bounded as follows: On the south by the alley north of lots one (1), two (2), three (3), four (4), and five (5), in Burgess, Zollinger, and Kamm's addition to the city of Fort Wayne, on the west by the alley east of lots nine (9), ten, and eleven (11) in said addition, on the north by the north line of

588 said addition projected, and on the east by Spy Run avenue; and the proceeds thereof shall be applied, first, to the payment of the residue, if any remain unpaid, of said sum of $11,132.45 found due to said Oscar A. Simons and John H. Bass, as assignees of said annuity mortgage; and, second, to the payment of said five-eighths ($\frac{5}{8}$th-) of said sum of $11,683.04 found due the plaintiff.

There shall not be sold the lands embraced in said mortgage from Henry J. Rudisill to John H. Barnett, but not embraced in said conveyance to Burgess, Zollinger, and Kamm or in said annuity mortgage, the same being described as follows: That part of section thirty-five (35), in township thirty-one (31) north, of range twelve (12) east, in Allen county, Indiana, bounded by Burgess avenue on the north, Lafayette street on the west, and the centre line of the old Bloomingdale road, as formerly used, on the southeast, being a triangular parcel of land, and the proceeds thereof shall be applied to the payment of said five-eighths ($\frac{5}{8}$th-) of said sum found due the plaintiff.

There shall not be sold the lands embraced in said mortgage from Henry J. Rudisill to Abraham G. Barnett, but not embraced in said annuity mortgage, the same being described as follows: Beginning three (3) chains and forty-six (46) links south of the east quarter-post of section thirty-five (35), township thirty-one (31) north, of range twelve (12) east, at a stone; thence four (4) degrees
589 east, eight (8) chains to the line of low-water mark; thence south thirty-nine (39) degrees east, five (5) chains; thence south seventy-four (74) degrees east, three (3) chains; thence north eighty-two (82) degrees east, six (6) chains and twelve (12) links; thence north twelve (12) and one-fourth ($\frac{1}{4}$) degrees east, one (1) chain forty-five (45) links to a stone; thence north sixty-five (65) and one-half ($\frac{1}{2}$) degrees west, eleven (11) chains and fifty (50) links; thence north twenty-three (23) and one-half ($\frac{1}{2}$) degrees west, six (6) chains and ten (10) links to place of beginning, containing five (5) acres and forty-seven hundredths, more or less, in Allen county, State of Indiana, and the proceeds thereof shall be applied to the payment of said five-eighths ($\frac{5}{8}$th-) of said sum found due the plaintiff.

There shall not be sold the lands described in the mortgage executed by said John H. Barnett to the plaintiff as aforesaid, the same being described as follows: The following-described premises in the city of Fort Wayne, county of Allen, and State of Indiana, to wit: All of lot one hundred and five (105) on the original plat of the town of Fort Wayne, except a strip off the east side of said lot ten (10 feet in width, running from front to rear thereof, and part of lot one hundred and six (106) on the same plat, commencing at a point on the east line of said lot thirty (30) feet south of the northeast corner thereof; thence running south along said line twenty (20) feet; thence west, at right angles therewith, to the west line
590 of said lot; thence north along said west line twenty (20) feet; thence east, at right angles therewith, to place of beginning, and the proceeds thereof shall be applied to the payment of so much as shall then remain unpaid from proceeds of sales of the

other lands hereinbefore ordered to be sold for that purpose of said sum of eleven thousand six hundred and eighty-three dollars and four cents ($11,683.04), found due the plaintiff, with the interest thereon, and the surplus, if any remain, to the clerk of this court, to abide the further order of the court.

It is further ordered by the court that all of said sales be made without any relief from valuation or appraisement laws, and that said commissioner first offer each parcel separately, according to existing subdivisions, before offering in larger bulk:

Provided, however, and it is expressly so ordered and decreed by the court, that the foregoing directions in relation to the distribution and application of the proceeds of said sales shall be subject to the payment of the *of* costs of this cause and the costs of sale, which are by the court directed to be paid and apportioned as follows, to wit:

The costs of the plaintiff's foreclosure, embracing the costs upon his bill, and of process on the defendants thereunder, and of the answers thereto and proceedings thereon, and the advertisement and sale of the property described in the mortgage executed to him, shall be paid out of the proceeds of the sale of the property described in said mortgage to the plaintiff.

591 The costs of the cross-bill of the defendants, Simons and Bass, asking foreclosure of said annuity mortgage and of all proceedings thereunder, including the costs of the advertisement and sale of the lands described in said annuity mortgage, shall be paid out of the proceeds of the sale of the lands described in said annuity mortgage. Of all the remaining costs one-half shall be paid out of the proceeds of the sale of the lands described in said annuity mortgage and one-half out of the proceeds of the sale of the lands described in said mortgages by Henry J. Rudisill to John H. Barnett and Abraham G. Barnett and not embraced in said annuity mortgage or said conveyance to Burgess, Zollinger, and Kamm.

And it is further ordered by the court that three hundred dollars be allowed to Lindley M. Linde for his services as guardian *ad litem* of the infant defendants, Byron Hueston Barnett and James William Barnett, to be paid out of the proceeds of the lands described in said mortgages from Henry J. Rudisill to John H. Barnett and Abraham G. Barnett and not embraced in said annuity mortgage or said conveyance to Burgess, Zollinger, and Kamm, next after the payment of costs hereinbefore directed to be paid out of the same.

And if the proceeds of said property be insufficient to pay said sum, after payment of said costs, then the same, or the residue thereof, shall be paid out of the proceeds of the lands
592 described in the mortgage to the plaintiff next after the payment of costs above directed.

And it is further ordered, adjudged, and decreed by the court that upon the said sales being made as herein directed, the equity of redemption of each and every of the said defendants in and to each and every of the parcels of land so sold be, and the same is hereby, forever barred and foreclosed, except as provided by the redemption laws of the State of Indiana.

And it is further ordered, adjudged, and decreed by the court that title of said Oscar A. Simons, John H. Bass, Henry Burgess, Hannah Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Anna Kamm, [and] Nellie Kamm to the lands conveyed by Henry J. Rudisill to Burgess, Zollinger, and Kamm, as aforesaid and described as follows: A part of the southeast quarter of section thirty-five (35) and a part of lot eight (8) of Wells' pre-emption, all in township thirty-one (31) north, of range twelve (12) east, to wit: Commencing two (2) feet east of the southwest corner of lot number one (1) in Eckart's addition to Fort Wayne, in said section thirty-five (35); thence west along the south line of said addition to the west line of the feeder to the Wabash and Erie canal; thence southwesterly along said feeder to its intersection with the right of way of the Fort Wayne, Jackson and Saginaw railroad; thence southeasterly along the said right of way to the center of the Bloomingdale road; thence
593 northeasterly with the center of said road to its intersection
with the north line of Elizabeth street; thence with the north line of said street to a point due north of the northwest corner of lot (11), in Rudisill's subdivision of part of lot eight (8), in Wells' pre-emption; thence northerly, at right angles to said street, three hundred and forty-three (343) feet; thence easterly, parallel with said Elizabeth street, three hundred and eighty-seven (387) feet to the west line of the St. Joseph road; thence northerly with the line of said road two hundred and twelve (212) feet; thence west, parallel with Elizabeth street, to a point due south of the place of beginning; thence north to the place of beginning, saving and excepting that when said tract is subdivided into lots an alley twelve feet wide must be left on the south and west sides of the lot occupied as a miller's residence, and also that a street 50 feet wide shall be left on the north and west sides of the tract of land now owned and occupied by Elizabeth Rudisill, and the title of each of them to the several part or parts of said lands now owned by him or her be, and the same is hereby, forever quieted and established against all claims of the plaintiff and of the defendants, Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, James William Barnett, Byron Hueston Barnett, Mary A. Wall, Susan B. Shoaff, and all persons claiming under them; and that the
594 said mortgage executed by Henry J. Rudisill and wife to
John H. Barnett, as aforesaid, on the 13th day of December, 1871, is not a lien upon any part of said lands last described.

To which finding and decree, and every part thereof, the defendants, Mary Wall, Watson Wall, Susan B. Shoaff, John A. Shoaff, Byron Hueston Barnett, and James William Barnett, and their said guardian *ad litem* in this behalf object and except. Said last-named defendants, for a more specific and particular exception to said finding and decree, say: That they object and except to so much of said finding and decree as sets aside said interlocutory decree and as finds and decrees that said release so executed by their codefendant, Abraham G. Barnett, of said mortgage, so executed by Henry J. Rudisill and wife to John H. Barnett, deceased, was a legal and valid release and binding upon these defendants and a valid discharge of the lands so sold by said Henry J. Rudisill and wife to said Burgess, Zollinger, and Kamm from said mortgage lien.

And they object and except to so much of said decree as quiets the title so conveyed by said Rudisill and wife to said Burgess, Zollinger, and Kamm as against said lien of said mortgage so executed to said John H. Barnett, deceased.

And these defendants object and except to said finding and decree, so far as it is found and decreed therein that the mortgage executed by said Henry J. Rudisill and wife to said Abraham G. Barnett shall be substituted in the place of said mortgage security so released by said Abraham G. Barnett. 595

And these defendants further object and except to said finding and decree, so far as it is found and decreed therein that these defendants have no right to have said mortgage so executed to John H. Barnett foreclosed, and said lands so conveyed to said Burgess, Zollinger, and Kamm sold for the benefit of these defendants, and that the proceeds arising from said foreclosure and the sale of said premises be paid over to said plaintiff, George P. Bissell, in liquidation of so much of the said mortgage debt due him so secured by the mortgage on the real estate devised by the said John H. Barnett to these defendants.

And these defendants object and except to all other parts of said finding and decree as finds and decrees against their rights as set forth in their cross-bills and in the bill of the plaintiff Bissell.

And these defendants further object and except to the said finding and decree and all parts thereof, except the decree in favor of the plaintiff, for the want of jurisdiction of the court to make such finding and decree among said defendants.

And the said defendants, Mary Wall, Susan B. Shoaff, Byron Hueston Barnett, and James William Barnett, now in open court pray an appeal in this cause from said finding and decree to the Supreme Court of the United States, which appeal is now in all things allowed upon said defendants' filing an appeal bond in this behalf, executed by Emmett Powers, in the penal sum of seven hundred ($700) dollars, conditioned for the due prosecution by said defendants of their said appeal and the payment by them of all costs adjudged against them in said Supreme Court, which bond so duly executed by said Powers is now tendered to the Court in open Court and filed in said cause, and which bond is now approved by the court, which said bond is in these words and figures, to wit: 596

Know all men by these presents that Emmett Powers is held and firmly bound unto George P. Bissell, Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, John E. Hill, Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew Hoffmeister, Nancy C. McCurdy, Alfred Hattersley, Oscar A. Simons, John H. Bass, Henry J. Rudisill, and

Elizabeth E. Rudisill in the penal sum of seven hundred dollars; for the payment of which well, and truly to be made and done, he binds himself firmly by these presents.

Sealed with his seal and dated this 14th day of December, 1882.

597 The consideration of the above obligation is, that whereas the United States circuit court within and for the district of Indiana on this day rendered its final decree in the cause therein pending in said court, wherein George P. Bissell was plaintiff and Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, Byron Hueston Barnett, James William Barnett, Susan B. Shoaff, John A. Shoaff, John E. Hill, Jr., Henry Burgess, Charles A. Zollinger, Hannah Kamm, Andrew Kamm, George Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Elizabeth Rudisill, Andrew Hoffmeister, Mary McCurdy, Alfred Hattersley, Oscar A. Simons, John H. Bass, Mary Wall, Watson Wall, Henry J. Rudisill, and Elizabeth E. Rudisill are defendants; and whereas said Mary Wall, Watson Wall, Susan B. Shoaff, John A. Shoaff, Byron Heuston Barnett, and James William Barnett have appealed from said decree to the Supreme Court of the United States:

Now, if said appellants shall duly prosecute their said appeal and pay all costs adjudged against them in said Supreme Court, or for which they may become legally liable, then this obligation shall be void; else in full force.

EMMET M. POWERS. [SEAL.]

Provided, however, that the appeal so prayed and granted shall not operate to stay proceedings under this decree.

All of which is now here finally ordered, adjudged, and decreed by the court.

598 UNITED STATES OF AMERICA, *District of Indiana*, } *sct*:

I, Noble C. Butler, clerk of the circuit court of the United States in and for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the record and proceedings in said court in the cause entitled George P. Bissell *vs.* Abraham G. Barnett *et al.*, and numbered 12 on the docket of said court, at Fort Wayne, in said district.

Witness my hand and the seal of said court, at Fort Wayne, this 14th day of August, A. D. 1883.

[Seal of The United States Circuit Court, Dist. of Indiana.]

NOBLE C. BUTLER, *Clerk*.

Endorsed on cover: Indiana C. C. U. S. No. 217. Mary Wall, Watson Wall, Susan B. Shoaff, John A. Shoaff, Byron Hueston Barnett, and James William Barnett, appellants, *vs.* George P. Bissell, Abraham G. Barnett, Nancy C. Barnett, Susan M. Barnett, John E. Hill *et al.* Filed November 30, 1883.

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FILED
MAR 17 1887

IN THE

Supreme Court of the United States.

MARY WALL, WATSON WALL, SUSAN B. SHOAFF, JOHN A. SHOAFF, BYRON HUESTON BARNETT, AND JAMES WILLIAM BARNETT, } APPELLANTS

VS.

GEORGE P. BISSELL, ABRAHAM G. BARNETT, NANCY C, BARNETT, SUSAN M. BARNETT, JOHN E. HILL, HENRY BURGESS, CHARLES A. ZOLLINGER, HANNA KAMM, ANDREW KAMM, GEORGE KAMM, CHARLES KAMM, HENRY KAMM, ANNA KAMM, NELLIE KAMM, ELIZABETH RUDISILL, ANDREW C. HOFFMEISTER, MARY J. McCURDY, ALFRED HATTERSLEY, JOHN H. BASS, HENRY J. RUDISILL, CHARLOTTE RUDISILL, AND OSCAR A. SIMONS. } APPELLEES

PHILADELPHIA BAR ASSOCIATION

BRIEF FOR THE APPELLANTS.

By L. M. NINDE,

Solicitor for Appellants.

FORT WAYNE, IND.

1887.

IN THE

Supreme Court of the United States.

MARY WALL, WATSON WALL, SUSAN B. SHOAFF,
JOHN A. SHOAFF, BYRON HUESTON BARNETT,
AND JAMES WILLIAM BARNETT. } APPELLANTS.

VS.

GEORGE P. BISSELL, ABRAHAM G. BARNETT,
NANCY C, BARNETT, SUSAN M. BARNETT, JOHN
E. HILL, HENRY BURGESS, CHARLES A. ZOLLINGER,
HANNA KAMM, ANDREW KAMM,
GEORGE KAMM, CHARLES KAMM, HENRY
KAMM, ANNA KAMM, NELLIE KAMM, ELIZABETH
RUDISILL, ANDREW C. HOFFMEISTER,
MARY J. McCURDY, ALFRED HATTERSLEY.
JOHN H. BASS, HENRY J. RUDISILL, ELIZABETH
RUDISILL, AND OSCAR A. SIMONS. } APPELLEES.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

On the 15th day of July, 1869, John H. Barnett and Abraham G. Barnett executed eight coupon bonds for $1,000 each to the appellee, Geoge P. Bissell; to each of which bonds were attached twenty coupons for semi-annual interest at the rate of nine per cent. per annum.

These bonds were secured by a trust deed executed by said John H. Barnett on portions of lots 105 and 106, in the original plat of Fort Wayne.

At the same time, and as a part of the transaction in which said loan was made, the appellee, Henry J. Rudisill, united in the application for said loan, and it was then agreed that $5,000 of said loaned money should go to said Rudisill, and that he should execute his bond to said John H. Barnett, binding himself to pay five of said bonds and all the accruing interest thereon, and that said Rudisill should secure said bond by a mortgage on about thirteen acres of land adjoining the city of Fort Wayne.

In pursuance of said agreement, said $5,000 of said loaned money was paid over to said Rudisill and he executed to said John H. Barnett his bond to pay $5,000 of said loan and secured the same by mortgage, executed by him and his wife to said Barnett. The said eight bonds and trust deed contained stipulations that they should become due upon failure to pay any installment of interest accruing thereon by virtue of which and the non-payment of the coupons falling due, the 15th of January, 1879, the whole debt became due.

John H Barnett died testate about the 5th day of January, 1872, and, by his will, devised said part of lot 106 to the appellant, Mary Wall, for life, remainder to said Byron Hueston Barnett, and the said portion of lot 105 to the appellant, Susan B. Shooff, for life, remainder to James William Barnett, and nominated said Abraham G. Barnett his executor.

Upon the failure to pay said coupons, maturing on the

15th of January, 1879, the appellee, Bissell, filed his bill in the court below to foreclose said mortgages. This bill appears in the printed record, p. 1 to 8 inclusive. The bonds and coupons appear on p. 9, and the trust deed on p. 10 to 13 inclusive, and the bond of Rudisill and the mortgage securing the same appear on pages 14 and 15, and the will of John H. Barnett on pages 15, 16, 17 and 18.

The plaintiff below filed an amendment to his bill, which appears on pp. 22, 23 and 24. But he afterwards filed a complete amended bill, which appears on pages 34, 35, 36, 37, 38, 39, 40 and 41. The exhibits are not again found in the printed record, but notes referring to them as above.

It appears from the bill, and, perhaps, all the subsequent pleadings, that A. G. Barnett never took out letters testamentary or gave bond, or qualified as such.

On the 23d of January, 1875, said Rudisill, desiring to sell said premises, mortgaged by him to John H. Barnett, to secure said $5,000, procured said A. G. Barnett to enter of record on the margin of the record of said mortgage the release thereof in the following terms:

"I hereby release from any and all liens by reason of this mortgage the following of the premises herein described: All that part of the southeast quarter of Section 35, Township 31, Range 12, east, this day conveyed by the said Henry J. Rudisill to H. Burgess, Charles A. Zollinger and J. J. Kamm. Witness my hand and seal as such executor, January 23, 1875. ABRAHAM G. BARNETT,

"Executor of estate of John H. Barnett, deceased.

"Attest: J. M. KOCH, Recorder of Allen County."

The deed to Burgess, Zollinger and Kamm includes nearly all the land mortgaged to J. H. Barnett and a small piece south of the Bloomingdale road, making in all about 16 acres. This deed is found on pages 69 and 70, and the land described in it is contained within the red lines on the map, on pages 248-9, exclusive of lot No. 3 and that portion between the west side of Spy Run avenue and the St. Joseph river, and it also includes the piece marked No. 6 on said map, south of the red line, north of the Bloomingdale road and east of the right of way of the Fort Wayne, Jackson and Saginaw railroad, and also that part of their laid-out plat south of the Bloomingdale road. The property described in the mortgage of Rudisill to Barnett, page 15, including all the land within the red lines on said map and said lot 6. It will thus be seen that the said release of A. G. Barnett covers all the land described in the mortgage of Rudisill to J. H. Barnett, except that strip between the west side of the Spy Run avenue and the St. Joseph river and said lot 3, and the three-cornered strip between the Bloomingdale road and Burgess avenue and Lafayette streets.

On the 30th of October, 1869, Henry J. Rudisill and wife executed to Elizabeth Rudisill a mortgage on the "south half of the northeast quarter containing fifty seven 36-100 acres; the north half of the southeast quarter, containing fifty-eight and 12-100 acres, and the southeast fraction containing twenty and 22-100 acres, all in Section Thirty-five (35), in Township Thirty-one (31), north of Range Twelve (12), east, saving and excepting therefrom all that part of said premises lying south of a line running westerly from the mill thereon and west of the St. Joseph road as now traveled," with some other exceptions not material to notice. Said mortgage appears on pages 49 and 50, and was given to secure the payment of an annuity of $800 a year from H. J. Rudisill to said Elizabeth Rudisill. This mortgage included the property described in the said mortgage from H. J. Rudisill to J. H. Barnett, except said lots Nos. 1 and 6 on said plat; it also included all the property described in the deed to Burgess, Zollinger and Kamm, except said lot No. 1 on said plat. Said mortgage to Elizabeth Rudisill also covered the mill property, which includes the premises between the east line of Section 35 and the center of the Spy Run avenue and north of the St. Joe turnpike.

Lot 5 is not included in the Elizabeth Rudisill mortgage. At the time H. J. Rndisill procured A. G. Barnett to execute said release of the J. H. Barnett mortgage, he executed to said Barnett a mortgage on the said mill property last above indicated, and also on said lot 5, to secure said bond so executed by said Rudisil to J. H. Barnett. Said lot 5 is of little value, stated by the master to be worth $1,100. This mortgage so executed to A. G. Barnett as a substituted security being a second lien subject to Mrs. Rudisill's mortgage as to all the property except lot 5, was worthless as a security for said bond for $5,000, and the interest and costs thereon, first executed by said Rudisill to J. H. Barnett.

Elizabeth Rudisill, at the time the conveyance was made by H. J. Rudisill to Burgess, Zollinger and Kamm, also released her mortgage on the premises so conveyed. This release, with other releases theretofore executed by her, reduced her mortgages to the mill property above specified.

The master, on page 249, finds this property worth $17,500. This annuity mortgage was purchased by the appllees, Bass and Simons, after this suit was instituted, and they filed their cross bill for its foreclosure, which appears on pages 44 to 49 inclusive. In said cross bill it was alleged that the dam and race was out of repair, and an application was made to appoint a receiver to repair the same with money to be advanced by said Bass and Simons. The receiver was appointed by order, found on page 50 and 51, and made two reports, one found on pages 103 and 104 and the other on page 182. By these reports it appears that the receiver received from Simons and Bass and invested in said repairs the sum of $4,227.75. The amount found due on the annuity mortgage was $11,132.45.

Both of these sums were first liens on the mill property, and amounted to $15,360.20, and, of course would consume the mill property and leave the mortgage so executed to A. G. Barnett worthless as security for the bond executed by Rudisill to J. H. Barnett.

It thus becomes apparent that unless the release of said A. G. Barnett of the mortgage executed by Rudisill to J. H. Barnett shall be held void and the validity of said mortgage established, said $5,000 secured by it will be lost to the estate of said Barnett, and the portions of the lots 105 and 106 covered by J. H. Barnett's trust deed to Bissell will have to bear the burden of Bissell's debt of $8,000, instead of only $3,000 of it, as was first agreed.

Whether or not this release is valid or invalid in law is the main question in the case.

When Bissell filed his bill to foreclose his mortgage, he set up this bond and mortgage of Rudisill to J. H. Barnett, and asked it also foreclosed, to pay the $5,000 of his debt, which Rudisill had assumed. See amended bill, pages 32 to 40 inclusive. To this amended bill the appellants filed their answers, pages 51 and page 80 to 84, and also their cross bill, page 86 to 92. In this cross bill the appellants, after setting up said mortgages, bonds and the release so executed by A. G. Barnett, ask that said release be decreed void and that the Rudisill mortgage to J. H. Barnett be foreclosed and the proceeds of the sale of the property be applied to pay the five-eighths of the Bissell loan and the interest accrued thereon after Rudisill ceased to pay the said interest and the costs. It is averred in this cross bill that said A. G. Barnett "declined, failed and refused to accept said trust, but renounced the same by then and there failing for more than twenty days after said will was duly probated, to qualify and give bond as such executor, and never has so qualified or given bond as such executor, or otherwise, or lawfully assumed to discharge the duties as such executor, or execute the trust created by or under said will," page 89.

Bass and Simons purchased the equity of redemption in the property in 1879 and 1880, and paid for the same and had the conveyances made to George Esmond to hold in trust for them. See their answer on page 180. Simons and Bass also purchased a portion of Zollinger's one-fourth interest in the property conveyed by Rudisill to Burgess, Zollinger and Kamm.

Simons and Bass, with Hoffmeister, Hattersley and McCurdy, who had also purchased small interests in Zollinger's purchase, filed their cross bill, in which they set up the annuity mortgage, the loan from Bissell to Barnett, the coupon bonds and trust deed to secure the same; the receipt by H. J. Rudisill of $5,000 of said loaned money and that he had assumed the payment of that amount of said loan and given his said bond in the penal sum of $10,000, conditioned on the payment of said $5,000, and secured the same by mortgage on said thirteen acres of land. That J. H. Barnett died in 1872 testate, and by his will appointed A. G. Barnett his executor, and vested in him "extensive and extraordinary powers in trust, and directed that he should act without giving bond or taking out letters testamentary, and that said A. G. Barnett, supposing in good faith that he was lawfully authorized to exercise the powers conferred upon him by said will without oath, bond or letters testamentary proceeded without such oath, bond or letters to take possession of the estate of said John H. Barnett, and settle the same and execute the trusts vested in him by said will, and was recognized and treated as the lawful custodian and representative of the estate of said John H. Barnett by all the debtors, creditors, heirs and legatees thereof." They further set up the sale by Rudisill to Burgess, Zollinger and Kamm, and the release of the Rudisill mortgage to John H. Barnett by A. G. Barnett and the release by Elizabeth Rudisill as to the premises so sold to Burgess, Zollinger and Kamm, and that she executed said release supposing it would make a clear title in the lands so sold to Burgess, Zollinger and Kamm. Their cross bill further sets up the purchase by Bass and Simons of the annuity mortgage and also a purchase by the cross complainants of Zollinger's interest in the thirteen acres mortgaged by Rudisill to J. H. Barnett. This cross bill appears on pages 187 to 195 inclusive. Henry Burgess and the Kamms also file their cross bill, in which they also set up an abstract of Bissell's bill, including the averments as to said Rudisill's receipt of $5,000 of said loan, and the execution of his said penal bond and mortgage to secure the same. But it is further averred in this cross bill that Bissell loaned said $8,000 to said Barnetts alone, and on the faith of said eight bonds of the Barnetts and the trust deed of J. H. Barnett as surety therefor. They further aver the death of said J. H. Barnett and that he left his will, and that by his will he expressly authorized and empowered A. G. Barnett to assume and exercise the entire exclusive and absolute control and disposal of all personal property owned by said testator at his death, and to have and receive the rents of his real estate for the purpose of paying debts and to remove his parents to the new cemetery and erect a monument. It is also averred that these brothers were very intimate and that the testator had implicit confidence in his brother, A. G. Barnett.

This cross bill also sets up the sale to Burgess, Zollinger and Kamm and the release of Rudisill's mortgage to J. H. Barnett by A. G. Barnett, and the execution by Rudisill to A. G. Barnett of the mortgage on the mill property to secure Rudisill's bond to J. H. Barnett, which it is averred was also then subject to Elizabeth Rudisill's annuity mortgage as a prior lien, and which at the time covered all the property so covered by said mortgage to A. G. Barnett, and the property covered by the mortgage by Rudisill to J. H. Barnett.

Also, that Bass and Simons had purchased the annuity mortgage and are seeking to foreclose the same. It is also averred that said Bissell in making said loan did the same through an agent, who acted also for the Barnetts, in getting the bonds and mortgage from Rudisill, and that Bissell knew nothing of the latter transaction till he came to file his bill to foreclose, and it is also averred that Rudisill and A. G. Barnett consulted with this agent as to the release of said mortgage and the substitution of the mortgage on the mill property, and assented to the same. It is also averred that A. G. Barnett has exercised the powers and executed the trust vested in him under the will and settled the estate with the knowledge and consent of all persons interested. The prayers of both these cross-bills are, that the title of all the parties to said thirteen acres derived through the deed from H. J. Rudisill and wife to Burgess, Zollinger and Kamm, be quieted as against said Bissell and the appellants, and that said release so executed by said A. G. Barnett be confirmed and established. The case was first heard on a preliminary argument upon which an interlocutory finding and decree were made and entered, declaring the opinion of the Court and fixing the theory upon which the case should progress to final decree. This interlocutory decree declared the release so executed by A. G. Barnett of said mortgage of Rudisill to A. H. Barnett was void because said A. G. Barnett had never taken out letters testamentary or qualified or given bond as executor, and that as to Bissell and the appellants, said release was inoperative.

Upon final hearing this interlocutory finding and decree were set aside, and the Court found the loan by Bissell to Barnetts and that the same was secured by said eight bonds and trust deed, and that there was due thereon $11,683.04. That H. J. Rudisill, for a good and sufficient consideration assumed to pay the principal and interest of five of said bonds, and secured his said obligation by his penal bond in the sum of $10,000 and secured the same by his mortgage, his wife joining therein, on said thirteen acres of land. That said John H. Barnett died on the 23rd day of January, 1872, testate, and by his will appointed A. G. Barnett the executor and trustee of his estate, and by authority thereof the said A. G. Barnett did exercise the functions of executor and trustee in the settlement of said estate without giving bond or taking any oath or receiving any letters testamentary as such executor; that said sale to Burgess, Zollinger and Kamm, was made as averred, and the release of said mortgage from Rudisill to J. H. Barnett was entered on the mortgage record by A. G. Barnett, and the execution to him by Rudisill of the substituted mortgage an the mill property. The execution of the annuity mortgage is also found as averred, and that there is due thereon $11,132.45, and that there is due Simons and Bass the sum of $4,227.75 for money invested by them in repairs through the receiver, all of which was found to be liens prior to the lien of the A. G. Barnett mortgage. And it is further found that said annuity mortgage continued to be a prior lien on the lands covered by the mortgage to A. G. Barnett, except as to that part conveyed to Burgess, Zollinger and Kamm, and that the said substituted mortgage given to A. G. Barnett, was a lien on the mill property, but subsequent to the lien for said advances and the lien of the annuity mortgage, and upon these findings the equity is found to be with Burgess, the Kamms, and Simons, and Bass, and that they were entitled to have their title to the property so mortgaged to J. H.Barnett quieted as against said Bissell,and the appellants. The decree was entered on these findings and the title to the property so conveyed to Burgess, Zollinger and Kamm quieted as against the appellants and said Bissell and the other property was ordered to be sold to pay the various claims as found.

The first clause of the final finding and decree on page 282 is in the following words:

"It is first ordered, and adjudged, and decreed by the "Court that the interlocutory findings and decree made "and entered in this cause, on the 10th day of February, "1881, be and the same are hereby vacated and set aside "as well as any and all other decisions, findings and or- "ders hereinbefore made which are contrary to the final "findings and decree now here pronounced and entered."

The findings and decree in the interlocutory order appear on pages 161 to 164 inclusive, and are continued in force so far as the same are not in conflict with the final findings and decree.

In the interlocutory findings on page 162, it is found that J. H. Barnett, by his last will, devised to the appellees the interest in said lots 105 and 106, covered by his trust deed to Rudisill. And it was further found on page 163 that said lots 105 and 106 were primary liable for three-eighth of said loan of $8,000, and that the real estate so mortgaged by said Rudisill and wife to J. H. Barnett, is liable for five-eighth of said loan.

The above findings of said devises to the appellants of said mortgaged portions of lots 105 and 106 vests in them the equitable right to have the Rudisill mortgage foreclosed in favor of Bissell and the proceeds from such foreclosure applied to the Bissell debt for the relief of the property so devised to them, and the interlocutory finding, as well as the final finding, agree in the liability of the property so mortgaged by Rudisill to J. H. Barnett, until said release was entered on margin of the record of said mortgage by A. G. Barnett. The interlocutory finding and decree declare this release void, while the final finding and decree declare it to be valid, and quiet the title conveyed to Burgess, Zollinger and Kamm, as against said mortgage and as against said George P. Bissell and these appellants.

The following clauses of the will of John H. Barnett contain the devises to the appellants, and the nomination of A. G. Barnett as executor, and the power conferred upon him.

"*First.*—I devise unto my elder sister, Mary Ann "Wall, the lot on Calhoun street, Fort Wayne., Ind, twenty "feet front, and sixty feet deep, including my rights in "the private alley to the west end of said lot, the same "being a part of lot No. one hundred and six (106), Old "Plat, on the southwest corner of Calhoun and Berry "streets, lying south and adjoining the thirty feet lot "on said corner, owned by Elizabeth Barnett, wife of my "brother, A. G. Barnett, to have and to hold the same "subject to the payment of all taxes and special assess-"ments for improvements, etc., as other city property is "taxed and assessed, for and during her natural life—the "remainder to Byron Heuston Barnett, eldest son of my "brother, A. G. Barnett and Elizabeth, his wife, if living "at the death of my said sister, Mary Ann Wall; if not "living at the said death of Mary Ann, then to his said

“ Byron Heuston’s living children ; and if he shall leave no
“ such living children, then this remainder of the devise
“ shall go to my brother, Abram G. Barnett, and his heirs
“ —that is, to him, if living, or if dead, to his heirs, the
“ same as if it had been willed direct to him and his
“ heirs.”

“ *Second.*—I devise unto my sister, Susan Barnett
“ Shoaff, a life estate only in lot one hundred and five, Old
“ Plat, in the city of Fort Wayne, Indiana, situated on
“ Berry street, and occupied by DeGroff Nelson, to have
“ and to hold the said lot so situated for her lifetime afore-
“ said, subject to the payment of taxes and assessments,
“ as stated in the first clause of this will ; at her death,
“ remainder to James William Barnett, the second son of
“ my brother, A. G. Barnett, and his wife Elizabeth, if he
“ shall be living then ; if dead, then to his child or child-
“ ren in lawful wedlock, and if none living, then to my
“ brother, A. G. Barnett, and his heirs—that is to him, if
“ living; but if dead, then to his heirs, as if it had been
“ willed direct to him and his heirs.”

“ *Sixth.*—I name my brother, A. G. Barnett, my ex-
“ ecutor, to act himself, or jointly with one he my chose ;
“ if acting alone then he shall and may do so without bond
“ as such executor, but if acting with another, both shall
“ give bond and take out letters testamentary, and proceed
“ according to law ; but if he shall act alone, then, as ex-
“ ecutor, he shall have authority under this will to proceed
“ as if he had letters testamentary, to execute the trusts
“ devolved on him as executor, as also those which may
“ incidently arise in the execution of this trust as executor,
“ but any others arising out of a different relation, such as
“ trustee or guardian of some of the parties named herein-
“ before. He shall have power to proceed to collect all
“ debts, judgments, or choses in action, due me at my
“ death, all rents due me at my death, of any and all my

"real estate, except the homestead, and to have control of "and dispose of all my personal property, moneys, and "effects, reducing them to availability, and to collect all "rents on the lots devised respectively, located in the city "of Fort Wayne, until such rents and the reasonable use "of the whole homestead place, including that devised to "Mrs. Susan Shoaff, and to himself, until such funds so "arising from rents, use of homestead, moneys, personal "property, etc., shall be enough to pay my debts, funeral "expenses, debts of last illness, and to purchase a lot in "Lindenwood cemetery, properly and fairly improve it, "pay for exhuming the remains of my father and mother, "their interment, and the erection of a monument suitable "to their condition in life, in said lot, and this shall be "done speedily as the nature of the business shall allow, "after which the devisees respectively herein lastly named "and incidentally referred to, shall control said property as "the same is intended in the respective clauses wherein "said property is devised."

The appellants insist that said final findings and decree are erroneous and inequitable so far as the same finds that the "equity is with the defendants, Henry Burgess, Hannah C. Kamm, Andrew J. Kamm, George L. Kamm, Charles Kamm, Henry Kamm, Anna Kamm, Nellie Kamm, Oscar A. Simons and John H. Bass on the answer and cross-bills, and that they and each of them are entitled to have their title quieted in them, as against the plaintiff, George P. Bissell and their co-defendants, Abraham G. Barnett, Nancy Catharine Barnett, Susan M. Barnett, Byron Heuston Barnett, William Barnett, Susan B. Shoaff, John A. Shoaff, Mary Ann Wall and Watson Wall, and all persons claiming under, by or through them, to the lands conveyed to Henry Burgess, Charles A. Zollinger and

Jacob J. Kamm, by Henry J. Rudisill and wife on the 23rd day of January, 1875, described particularly hereinafter, and in the cross-bill of Burgess and the Kamms."

And the appellants further insist that all other portions of said findings that find that said mortgaged premises, or any portion described in said mortgage so executed by Henry J. Rudisill and wife to John H. Barnett to secure $5,000 of said Bissell debt, was released from said mortgage and not liable to be foreclosed to pay the debt secured thereby, or that finds said release of said mortgage so executed by A. G. Barnett was valid, are eroneous and inequitable and contrary to the clear rights and equities of said appellants and said George P. Bissell.

The appellants insist that the following part of said final decree are eroneous and inequitable, to-wit:

"And it is further ordered, adjudged and decreed by "the Court, that the title of said Oscar A. Simons, John "H. Bass, Henry Burgess, Hannah Kamm, Andrew J. "Kamm, George L. Kamm, Charles Kamm, Anna Kamm, "and Nellie Kamm, to the lands conveyed by Henry J. "Rudisill to Burgess, Zollinger and Kamms, as aforesaid "and described as follows, to-wit:

"A part of the southeast quarter of section thirty-five "(35) and a part of lot eight (8) of Wells Pre-emption, all "in township thirty-one (31), north of range twelve (12) "east, to-wit: Commencing two (2) feet east of the south-"west corner of lot number one (1), in Ewing's addition "to Fort Wayne, in said section thirty-five (35); thence "west along the south line of said addition to the west "line of the feeder to the Wabash and Erie canal; thence "southwesterly along said feeder to its intersection with "the right of way of the Fort Wayne, Jackson and Sagi-

"naw railroad; thence southeasterly along the said right "of way to the center of the Bloomingdale road; thence "northeasterly with the center of said road to its inter- "section with the north line of Elizabeth street; thence "with the north line of said street to a point due north of "the northwest corner of lot eleven (11), in Rudisill's sub- "division of part of lot eight (8), in Well's Pre-emption; "thence northerly, at right angels, to said street, three "hundred and forty-three (343) feet; thence easterly, "parallel with said Elizabeth street, three hundred and "eighty-seven (387) feet, to the west line of the St. Joseph "road; thence northerly with the line of said road, two "hundred and twelve (212) feet; thence west parallel with "Elizabeth street, to a point due south of the place of be- "ginning; thence north to the place of beginning, saving "and excepting that when said tract is sub-divided into "lots, an alley twelve feet wide, must be left on the south "and west sides ef the lot occupied as a miller's residence, "and also that a street fifty feet wide shall be left on the "north and west sides of the tract of land now owned and "occupied by Elizabeth Rudisill, and the title of each of "them to the several part or parts of said lands now owned "by him or her, be, and the same is hereby, forever quieted "and established against all claims of the plaintiff, and of "the defendants, Abraham G. Barnett, Nancy C. Barnett, "Susan M. Barnett, James William Barnett, Byron Heus- "ton Barnett, Mary A. Wall, Susan B. Shoaff, and all "persons claiming under them; and that the said mort- "gage executed by Henry J. Rudisill and wife to John H. "Barnett, as aforesaid, on the 13th day of December, 1871, "is not a lien upon any part of said lands last described."

And the appellants insist that said paragraph in said decree and every part thereof, is erroneous and against equity, and violates the clear rights of the appellants and said Bissell. But they say and insist that instead thereof said Court below should have found and decreed that the equities were with the appellants and said Bissell, and that they were entitled to have said mortgage executed by Henry J. Rudisill and wife to said J. H. Barnett, foreclosed and the land therein described held to pay the said $5,000, and the interest thereon not paid by said Rudisill and such other and further relief should have been decreed to the appellants as their rights and equity required.

ARGUMENT.

There are two principal questions for discussion in this case:

FIRST.—Had A. G. Barnett power by virtue of his nomination as executor in the will of John H. Barnett, without qualifying, giving bond, or taking out letters testamentary from the proper Court, to release the mortgage executed by Rudisill and wife to said testate?

SECOND.—Did the will create and vest in A. G. Barnett such trusts and powers as enabled him to legally discharge said mortgage without letters testamentary?

First.—A. G. Barnett's nomination as executor gave him no power or authority as such until he was appointed executor by the Court having probate jurisdiction, and qualified, gave bond and letters testamentary were issued to him.

The following statutes were in force at the time J. H. Barnett died, and continued in force until long after A. G. Barnett executed said release, and are yet in force with only immaterial verbal changes:

" *Be it enacted by the Legislature of the State of Indiana,* " That after the expiration of ten days from the time when " the existence of a will shall have been made known, and " it shall have been duly admitted to probate, the proper " clerk shall issue letters testamentary thereon to the " persons named therein as executors who shall qualify, " unless—

" *First.*—Except married women, they being incapable " of making a contract;

" *Second.*—Be under the age of twenty-one years;

" *Third.*—Have been convicted of an infamous crime;

" *Fourth.*—Or shall be adjudged incompetent by reason of improvidence, habitual drunkenness, or other incapacity, * * *

" SEC. 3. Every person named in the will as executor, " who shall qualify and give bond, shall be named in such " letters, and every person not thus named, shall be deemed " superceded.

" SEC. 4. Any person who is appointed executor " who shall renounce his trust, in writing, filed with the " clerk, or who shall fail to qualify and give a bond within " twenty days after probate of such will, shall be deemed " to have renounced such appointment, and such letters " shall issue to any other person named in the will capable " and willing to accept such trust.

" SEC. 5. No executor named in the will shall interfere with the estate entrusted to him further than to " preserve the same until the issuing of letters; but for " that purpose he may prosecute any suit to prevent the " loss of any part thereof.

" SEC. 6. If there be no person named in the will as " executor, or of those named therein fail to qualify, have " renounced, or have been removed, letters of administra-

> " tion, with the will annexed, shall be granted by the
> " proper clerk or court, to any competent residuary lega-
> " tee named in such will, willing to accept, or if there be
> " none willing to accept, then to any competent legatee,
> " or if there be none such willing to accept, then to any
> " competent person under the same regulations as in grant-
> " ing letters of administration in case of intestacy."

At common law the execution of the will in which an executor is named and its probate by the executor vests in him the testator's title to his personal estaet; and, of course, the right to collect and release debts due him. But under our system the management of estates of deceased persons is entirely regulated by statutes. No person is authorized to act as executor nor administrator untill he is appointed and receives his letters from the proper court. This proposition was settled by our Supreme Court in the case of *Landers v. Stone*, 45 Ind., 408. The Court in passing upon an application for letters of administration as to property not disposed by the will notwithstanding an executor had been appointed, says:

> "Whenever there is a will there must be either an
> " executor or administrator with the will annexed. The
> " only difference between an executor and an administrator
> " with the will annexed, consists in their mode of appoint-
> " ment. The one is designated by the testator and ap-
> " pointed by the clerk or court. The other is appointed
> " by the clerk or court."

In *Croxton v. Bennor*, 103 Ind., 226, and in *Jeffersonville, etc. v. Swayne*, 26 Ind., 477, it is held that—

> " The jurisdiction of the court to grant letters of ad-
> " ministration is derived from the statute, and can only be
> " exercised in the cases provided for thereby."

That the common law power of executors to act before letters testamentary are issued to them is entirely abolished by these statutes is clearly declared in Kent's Com., vol. 4, p. 519:

"But by the New York Revised Statutes some judi-
"cious improvements are made upon the antecedent law. It
"is declared that infants under the age of twenty-one
"years, and aliens not being inhabitants of the State are
"not competent to serve as executors; nor is a married
"woman entitled to letters testamentary unless with the
"consent, in writing, of her husband; and in that case he
"is deemed responsible for her acts jointly with her. A
"non-resident executor is required to give the like bond
"as is required by law of administrators, and on the ob-
"jection of a creditor or other person interested in the
"estate, the Surrogate, on reasonable cause shown, may
"require the like security from any executor, either be-
"fore or after letters testamentary are granted. If letters
"be granted upon any will, the executors not named in
"them, cannot act until they appear and qualify, nor can
"an executor interfere with an estate except to pay
"funeral charges, before letters testamentary are granted,
"and the power of an executor of an executor to adminis-
"ter on the estate of the first testator is abolished. These
"provisions are calculated to secure fidelity and increase
"confidence in the execution of a delicate and dangerous
"trust."

Under the above statutes and authorities the appellants claim that. A. G. Barnett, although named in the will as executor had no power to act as such until he was duly appointed by the proper court, and qualified, and gave bond as the statutes required, and that his failure for more than twenty days to apply for letters, was by the express terms of the statute a renunciation of his rights and powers as executor, and anything done by him assuming to act as executor was absolutely void for want of power.

Having thus renounced his rights as executor, by failing within the twenty days to apply for letters, his execution of said release of Rudisill's mortgage to the testate was absolutely void. A release of that mortgage could not be made by A. G. Barnett, because he was not interested in it nor in the property devised to the appellants for the benefit of which the released mortgage was made.

A release of a debt can only be made by the party legally or equitably entitled to it.

> "A release of a debt should be made by him who has "the legal interest in it; and if made by one who has not "such an interest, but is beneficially interested, and is "not the plaintiff of record, though this may, for many "purposes release the debt, it has been held it cannot de"feat the action at law. If the release be made by the "trustee, or other party having the legal interest it can "be set aside, if to the prejudice of the party beneficially "interested, and made without his consent."
>
> 2 Parsons on Com. Law, 221, 222.
> Eastman v. Wright, 6 Pick., 322,
> Loring v. Brackett, 3 Pick., 403.

This mortgage from Rudisill to J. H. Barnett by subrogation was equitably transferred to Bissell. He was a creditor of both Rudisill and Barnett. Barnett held it in trust for Bissell and any effort of Barnett's, by means of his will to place said Rudisill mortgage in the hands of A. G. Barnett, or subject to his control with power to enable him to collect and ,waste it or release it would be a violation of the clearest equity of Bissell, and a fraud upon his rights, whatever may have been the irresponsible powers at common law if an executor nominated in the will, but who has taken out no letters and given no bond.

The statutory system prevailing in America will not tolerate such irresponsible exercise of said powers. Neither does it make any difference that this mortgage so held by J. H. Barnett was to benefit his devisees of the interest he held in lots 105 and 106. Our statutory provisions are intended to protect legatees and devisees as well as creditors.

Chancellor Kent, in the above paragraph, makes no distinction between creditors and beneficiaries under the will. The statutes are designed alike to protect all. When a will creates a right the statute requiring a bond from the executor before he can act, applies to and protects such right as well as the rights of creditors. An honest administration in all respects and the protection of all rights is the purpose of the statute.,

The following authorities clearly sustain these views:

Section 2 of Mr. Schowle's Executors and Administrators, declares the rule to be: That as to the preservation of property and the payment of debts there is little or no difference found in modern practice between the administration of testate and intestate estates. "The modern tendency, however, both in England and the United States, is * * * to require both executors and administrators to take out letters and qualify in the same special court; rendering their accounts upon a like plan and subject to a like supervision."

In section 52 the author says: "Hence according to our present proceedure an executor derives his office (1) from a testamentary appointment, which (2) is confirmed by a decree of the probate court, and the issue of letters testamentary to him accordingly."

Also section 137. "In other words qualification by bond is a pre-requisite to receiving letters testamentary. The executor derives his office only under a testamentary appointment which has afterwards been confirmed by a decree of the Probate court, and the grant of letters; nor is one entitled to exercise any power as executor until he has been duly qualified. Such is the rule in most American states as prescribed by the legislature. * * In some states the court cannot dispense with surety should the will direct otherwise."

In *Bankhead v. Hubbard*, 14 Ark., 298, the will contained this provision:

"Lastly I appoint my beloved wife sole executrix and direct that she shall not be required to give bond."

The clerk, in vacation, issued letters without bond, which were set aside by the court below, and an appeal. taken. The statutes of Arkansas, like those of Indiana, require bond to be given when letters issue. After citing these statutes the Court says:

"These provisions speak for themselves, and are too "plain to require construction. They indicate the general "policy of the act to be to require security in all cases. "This security is for the benefit of creditors, heirs, de- "visees, and legatees, and there are but few instances in "which it should be dispensed with. Perhaps in the case "of a sole heir or devisee being appointed executer or ad- "ministrator, and no debts against the estate, bond and "security need not be given, because waste or misman-

" agement of the estate would be guarded against by mo-
" tives of self-interest, and in any event could injure no
" one but himself."

In *Hunter v. Bryson*, 5, *Gill v. Johnson*, 483, the testator in Ireland, by his will, appointed trustees and executors in Ireland, and proceeds as follows:

> " And as all the property that I have now willed is in
> " our firm in Baltimore, in America, known by the name
> " or firm of McCartney & Saunders, I, therefore, nominate
> " and appoint Hugh Thompson, merchant, Nathan G. Bry-
> " son, and Thomas Haines, all of Baltimore, in America,
> " trustees of all my property in America, and it is my will
> " that these trustees that I have appointed to do all my
> " said American affairs, shall have full power to act for me
> " and to settle all my accounts in the way they shall think
> " best, and so soon as they conveniently can they shall
> " remit said property to my trustees and executors that I
> " have hereby nominated and appointed in Ireland."

Bryson's co-trustees in Baltimore had refused to act, and Bryson had taken out letters of administration on the testate's estate, and in that character had collected the money in controversy. The petitioner, who was one of the executors in Ireland, asked that Bryson be ordered to pay the money to him, while Bryson asked for an order to pay the money by himself as administrator to himself as trustee, which order the Court below entered, from which the appeal was taken.

The Court says:

> " The provision in the will *per se*, created them limited
> " executors, and two of them having declined the appoint-
> " ment and the third accepted it, he is bound to execute
> " the trust in the mode prescribed by the instrument un-

"der which he derives his authority. * * * But suppose him not to be created executor by the clause in the "will which has been referred to, and that the testator's "design was that the persons appointed should act literally as trustees without taking out any letters testamentary or of administration the appointment is a nullity "as far as the personal estate is concerned being an attempt to evade the provisions of our testamentary system in a way which the law does not tolerate.

"The administrator in relation to the personalty, is "*ex officio* bound to the execution of every duty with which "it was illegally attempted to clothe the trustees. And "the effort to transfer the funds in the manner proposed "by the decree from the hands of Nathan G. Bryson, as "administrator, to those of Nathan G. Bryson, as trustee, "is giving a construction to the act of the testator to which "no principal of judicial interpretation will lend even a "momentary sanction."

The following authorities sustain the above theories:

19 Ala., 666, 6 Ga., 443, 9 Pick., 395, 7 Gratt., 36,
32 Conn., 502, 7 Watts & S., 401, 60 Me., 411, 1 B.Monr 234.
17 Miss., 339, 59 Mo., 491.

But it was claimed below, and will be here, that A. G. Barnett, was invested by the will with sufficient powers as trustee to authorize him to release the mortgage even if he could not act in that behalf as executor until he had qualified and given bond as required by statute.

The proposition is that although he could not act as executor because he had given no bond, he could act as trustee, although he had given no bonds. The argument concedes that the law gave him no power to act directly as executor, for the want of a bond but would authorize him to act indirectly as trustee, even without bond, or in other words, that he might waste this mortgage debt belonging to Bissell and these appellants, as trustee, without any available responsibility. It is claimed that the will must be construed that where it declares he shall "collect all debts, judgments or choses in action due me at my death," he was to do so as trustee, and not as executor. I submit that such a construction cannot be tolerated. If it be the true construction, then the provision is void, as held in the case of *Bryson v. Johnson*, above cited.

It is sufficient answer to this claim that this mortgage asset was not left by the will to A. G. Barnett, he had no right or title to it to hold it in trust or otherwise. There is no express authority given to him to deal with it as trustee, but the collection of it is the ordinary duty of an executor, and is covered by his bond, even if the clause shall be so construed as not to expressly authorize him to collect as executor, yet the intent that he should so collect will be presumed.

In *Sanderson v. Stearns*, 6 Mass., 37, it was held that where the income of a certain fund was given to one for life, and after her death the principal to her children, the executor or administrator, with the will annexed, was the trustee.

But there are statutory difficulties in the way of the administration of the estate of J. H. Barnett by A. G. Barnett as trustee and not as executor. Trusts and powers in Indiana are subject to the provisions of our Revised Statutes of 1881.

Sec. 2977. "No person who shall in good faith pay "money to a trustee authorized to receive the same, shall "be responsible for the proper application of such money.

Sec. 2978. "Upon the death of a sole or surviving "trustee of an express trust, the same shall vest in the "court having jurisdiction thereof and such court shall "forthwith appoint a successor in whom the trust shall "vest.

"Sec. 2980. "Trustees having violated, or attempted "to violate any express trust, or becoming insolvent, or of "whose solvency or that of their sureties, there is reasonable doubt, or for other cause, in the discression of a "court having jurisdiction may, on the petition of any "person interested, after hearing, be removed by such "court, and all vacancies in express trusteeships may be "filled by the Court.

Sec. 2995. "Upon the death of the *cestui que trust*, or "upon the determination of the terms and conditions of "the instrument creating it, it shall be the duty of the "trustee to at once account for and pay over to the person "or persons entitled thereto to the money and assets that "may be on hand, belonging to the trust.

Sec. 2996. "If any trustee of any trust now existing "shall be dead or any trustee of a trust now, or hereafter "to be created, shall die, or for any cause refuse to act, "the Circuit court or Superior court of the proper county "may fill the vacancy by the appointment of some suitable "person who shall execute bonds for the faithful performance of the duties of his trust as herein before provided.

Sec. 2997. "Said trustee, and the funds in his hands "shall be at all times under the equitable control of the "court having jurisdiction thereof for the preservation of "the funds, and carrying out the purposes of the trust."

If the trusts claimed to be created by this will are express trusts to be executed by a trustee, and not an executor, then they are within the provisions of the above statutes and may be administered by the trustee so long as he remains solvent, and acts honestly without the supervision of any court. If however, he becomes insolvent, or refuses to act, or resigns, or of whose solvency there is a reasonable doubt, the Superior court which has no probate jurisdiction whatever, upon the petition of any one interested, may appoint a trustee, and take entire jurisdiction of the estate, and the administration thereof. Such a theory would oust our Circuit courts of probate jurisdiction of such estates, and either transfer their administration to the Superior court, or the trustee, if he acts discreetly, may close the estate up in defiance of the jurisdiction of the Circut court which possesses exclusive probate power. If this can be done as to heirs, distributees, legatees, and devisees it can be done as to creditors, and the safer and better system of the administration of estates in the United States is destroyed, and a system worse than that under the common law adopted.

But even if such a theory can be sustained, I insist that the trustee must under a fair construction of sections 2980, 2996 and 2997, give bond before he can undertake the administration of such an estate. To suffer such a trustee to assume the administration of such an estate without bond or without the authority of the probate court, would be distructive to the rights of the *cestuis que trust*, and in violation of the said statutes, and the statutes first above cited, vesting exclusive jurisdiction over estates, and the granting of letters testamentary and administration in our Circuit courts. I insist, that these statutes upon trusts and powers properly construed, in no way conflict with the statutes first above set forth governing the administration of estates. I concede a testator can devise real estate in trust for any proper purpose, and that legacies may be given in trust after the administration is through. In both these cases the trusts will be good, and be subject to the provisions of the above statutes upon the subject. In both the trusts will be subject first to the due administration of the estate. The land so devised will vest at once in the trustee, upon the probate of the will, but subject to be sold by the executor to pay debts under the proper proceedings in the probate court. In case of the legacy the executor will retain it if necessary to pay debts, and the gift in trust fails. An attempt te create a legacy in trust that shall pass directly to the trustee, and exclude the executor and the jurisdiction of the probate court, would be void upon this proposition. The cases above cited from Maryland and Arkansas are in point.

But suppose, by a due construction of Barnett's will, A. G. Barnett was created trustee as claimed, and that the testator had the power under the law to create such a trustee to the exclusion of the probate jurisdiction over and the ordinary administration of the estate. I insist the release and waste of this mortgage was not within his power. It was left in trust to be collected and applied to the payment of five-eighths of the Bissell mortgage. It was left for the benefit and protection of the devisees of the property mortgaged to Bissell.

It was insisted below that this will created a power in trust over this mortgage. It is manifest that no such power was created or can exist.

The will did not, nor could not, create in A. G. Barnett a collateral power over this mortgage. If it did not vest the title to the mortgage in him the power would be void. If he did not take the title to the mortgage it vested nowhere under the will. If he did not take it as trustee, no one did except the executor or administrator, with the will annexed, and if the title vested in such officer his power to collect would exclude the power of the trustee and thus avoid it.

But I insist that no intent can be gathered from the will to vest the title to this mortgage in A. G. Barnett, as trustee. Such intent is negatived by the express terms of the gift to him as executor.

But suppose the title to this mortgage did vest in A. G. Barnett, in trust, to collect and pay the testate's debt to Bissell. Can his release of it for nothing be sustained? I insist the release was fraudulent, and that the very parties now insisting on it were the principal parties in the fraud. If A. G. Barnett held the title to the mortgage at all, he held it in trust for Mary Wall and Susan Shoaff, who were married women, and James W. Barnett and Byron H. Barnett, who are minors.

None of these *cestuis que trust* were parties to this release, or had any knowledge that it was executed. In violation of their rights and of the duties of the trustee, Rudisill, with the co-operation of Burgess, Zollinger and Kamm, procured Barnett to make this release. Mr. O'Rourke, who was employed by Burgess, Zollinger and Kamm, as their attorney to examine the title prior to their purchase, found this mortgage and assisted in having it released.

Rudisill, in his deposition, gives the following account of that transaction. (See printed record page 238.)

To interrogatory number 5, he says :

"The mortgage of January 23d, 1875, was given to "Abram G. Barnett, executor of J. H. Barnett, deceased, "solely for and in consideration of his release of the mortgage of December 13th, 1871, upon all lands conveyed "to Messrs. Kamm, Zollinger and Burgess. I had made "a sale to these parties of a portion of the land covered "by the mortgage of December 13th, 1871, and could "not complete the sale or give a clear title without "this release The mortgage contemplated in the original agreement, and in all the conversations in regard "to this matter, had with Messrs. J. Hough, J. H. "Barnett, A. G. Barnett and D. C. Fisher they never "claimed to me that it was the intention or the understanding that I should mortgage the mill property, and "I repeat that had not the mortgage of December 31st, "1871, been cancelled that of January 23d, 1875, would "not have been given."

Interrogatory No. 6:

"States the particulars of the sale to Messrs. Burgess, "Zollinger and Kamm, and the release by A. G. Barnett "of your first mortgage to J. H. Barnett, what Messrs. "Burgess, Zollinger and Kamm paid, and whether the sale "was not in the utmost good faith on their part and "yours?"

To interrogatory number 6 he says:

"The sale was made in the utmost good faith between "us. The consideration paid was the amount recited in "the deed to them by me, which I do not now recollect— "several thousand dollars. The negotiations for the sale "and purchase were between Mr. J. J. Kamm and myself, "and after the price and the terms were agreed upon, Edward O'Rourke, attorney, was selected by Messrs. Kamm, "Burgess and Zollinger, to make an abstract of title for "them. When he came to the mortgage of December 13th, "1871, I informed him that Mr. A. G. Barnett, as executor of J. H. Barnett's estate, had told me that the power had been expressly conferred upon him by his deceased brother, to release mortgages and do many other things that he might consider for the best interest of the estate to do, and that upon the execution of another mortgage upon property of equal value, he would release that of December 13th, 1871. Mr. O'Rourke accepted this arrangement as satisfactory, and I went with Mr. A. G. Barnett to Mr. W. H. Withers had a new mortgage covering the mill property as subsequently sold to Mr. John E. Hill, jr., prepared, acknowledged and signed by myself and wife, and then with Messrs. Withers, Barnett and O'Rourke, went to the recorder's office, and Mr. A. G. Barnett signed the entry of release upon the margin of the record of the mortgage of December 13th, 1871, and filed the mortgage of January 23d, 1875, for record. My mother subsequently released her annuity mortgage to the same property, and the deed was executed and delivered to Messrs. Kamm, Burgess and Zollinger. It is due to Mr. A. G. Barnett to state that the release upon the mortgage of December 13th, 1871, was made by him out of good will to me, without any other consideration than that already named, and as he and the other parties connected with the transaction believed without jeopordising the interests of the estate in the least or to the injury of the liens."

In this examination of title the purchasers discovered this mortgage. They also knew of the will because the authority they procured Barnett to exercise depended upon it. They therefore knew his authority and duty were to collect the moneys and pay the Bissell debt with it and thus release the devised property. They must be held to full notice of all these rights and duties, and they all unite in the release of the mortgage and the waste of the trust estate.

"If a trustee releases or compromises a debt without "sufficient reason he will be answerable for it in his ac- "counts."

2 Perry on Trusts, Sec. 482.

"It is a universal rule, that if a man purchases of a "trustee with notice of the trust he shall be charged with "the same trust in respect to the property as the trustee "from whom he purchased."

1 Perry on Trusts Sec. 217.

Here the purchase money did not reach the trustee, but the purchasers had notice of the equities of the appellants, and that the release was without any consideration, or upon one entirely worthless, and one which the trustee had no power to accept. I insist that the appellants cannot be thus deprived of their estate, nor can such purchasers honestly claim the protection asked. I insist that the court below in finding that the equities were with the appellees and in quieting their title erred, and for which error the decree ought to be reversed.

By L. M. NINDE,
Solicitor for Appellants.

125-38

APR 14 1887

Supreme Court United States.

OCTOBER TERM, 1886.

No. 217.

MARY WALL ET AL. *vs.* GEORGE P. BISSELL ET AL.

Appellants' Memoranda.

The mill property must first be sold to pay the annuity mortage, because the John H. Barnett mortgage was executed while Rudisill still owned the mill.

Savings Bank *vs.* Cresswell, 100 U. S., 630.
Ovis *vs.* Powell, 98 U. S., 176.
Henderson *vs.* Truitt, 95 Ind., 313.

Mortgagees are *bona fide* purchasers within the rule.

78 Ind., 493.
100 Ind., 229 and 247.

MATTERS OF FACT.

1st. Appellants never knew of the release of their mortgage executed by Rudisill to John H. Barnett, nor that A. G. Barnett had not taken out letters testamentary, till this suit was brought.

See A. G. Barnett's deposition, printed record, pp. 130 and 133; Mary Wall's deposition, pp. 134 and 155.

2d. Rudisill acted fraudulently in procuring the release of the J. H. Barnett mortgage, and the purchasers, to say the least, were negligent.

See A. G. Barnett's deposition, p. 130; Rudisill's deposition, p. 238.

3d. The estate was given over to the appellants two years before the release was made. Pp. 155 and 169.

4th. The $8,000 was first to be loaned to the Barnetts and Rudisill, and the 13 acres to be included in the trust deed to Bissell, but was changed to its present form on account of Rudisill's bad credit.

See deposition of A. G. Barnett, pp. 121 and 122.

5th. The two Barnetts were not partners.

See deposition of A. G. Barnett, p. 120.

L. M. Ninde,
For Appellants.

125=382
125-382

IN THE SUPREME COURT

OF THE

UNITED STATES.

MARY WALL, ET AL., *Appellants*,

VS.

GEORGE P. BISSELL, ET AL., *Appellees*.

BRIEF FOR APPELLEES, BURGESS AND KAMMS.

By S. R. ALDEN.

Gazette Job Printing Co., Fort Wayne, Ind.

BRIEF ON MOTION.

Appellees Burgess and the Kamms have filed a motion, with notice to appellant thereof, to dismiss their appeal.

1st. Because the cause was not docketed nor the record filed in this court for more than eleven months after the appeal was taken.

2d. Because appellants are but part of the defendants against whom a joint judgment was rendered, and no excuse or reason for non-joinder is shown.

Appellees cite in support of the first reason Griggsby vs. Purcell, 99 U. S., 505, and of the second,

Masterson vs. Herndon, 77 U. S., 416, and respectfully suggest that under the rulings therein the appeal should be dismissed.

SAMUEL R. ALDEN,
For Burgess & Kamms.

IN THE SUPREME COURT

OF THE

UNITED STATES.

MARY WALL, ET AL.,
Appellants,
VS.
GEORGE P. BISSELL, ET AL.,
Appelles.

BRIEF FOR APPELLEES, BURGESS AND KAMMS.

STATEMENT.

Appellants' statement of the case, covering but part of the material facts and being in part controverted, appellees Burgess and the Kamms present the following summary of facts in the case for the most part in chronological order.

In 1860, defendant, Henry J. Rudisill, having received from his mother, the defendant, Elizabeth Rudisill, a conveyance of a valuable mill, water-power and large tract of land adjacent on the west side of the St. Joseph River in Allen County, Indiana, executed and delivered to her in consideration thereof a mortgage conveying the same to her as security for the payment to her of $200 quarterly on the first days of January, April, July and October of every year during her life.

The defendant, Elizabeth Rudisill, was born November 25th, 1805, and her said annuity mortgage duly recorded. Record pp. 49, 50, 222, 223, 241, 242.

Early in 1869 at the suggestion of J. H. Barnett, deceased, it was agreed between him and H. J. Rudisill that for $5,000 on time to be secured by second mortgage on part of the land covered by said annuity mortgage, said Barnett should transfer to said Rudisill a one-sixth interest in the real and personal property and business of the St. Joe Paper Mills, owned and operated by said Barnett, one N. B. Freeman and A. G. Barnett, a brother of said J. H. Barnett. Record pp. 235, 236.

July 15, 1869, the brothers Barnett *jointly* execute eight bonds, and J. H. Barnett a trust deed to secure them to G. P. Bissell & Co., pp. 8 to 13. The $8,000 is paid to the brothers Barnett by draft to their order, less the commission of John Hough, who procured the loan for them, and some claims in court and prior liens on the property mortgaged. The balance they put into the paper mill business; p. 122.

Several weeks thereafter said Hough, who was a real estate and land agent and regularly engaged in making loans for G.

P. Bissell & Co., brings to J. H. Rudisill a bond, p. 14, in the penal sum of $10,000, payable to John H. Barnett, dated July 15th, 1869, conditioned for the payment of $5,000 with the same interest and upon the same terms and conditions as the bonds of the brothers Barnett to Bissell & Co., and requested him to sign the same. Rudisill objected to signing it without receiving the consideration; viz., one-sixth interest in the paper mill. Hough, who knew the bargain between J. H. Barnett and Rudisill fully, having talked it over with them, assures Rudisill the bond will not be delivered till the transfer is made, whereupon Rudisill signs it and Hough takes it to his office; p. 236.

The transfer is never made, Rudisill receives nothing whatever for signing said bond; p. 236.

Two years later Rudisill being re-elected County Auditor and not able to enter upon the paper making business consults with N. B. Freeman about taking said sixth interest from J. H. Barnett and paying him the amount Rudisill was to have paid, viz. $5,000. Freeman is willing and agrees to take the same from J. H. Barnett and pay for it. In December, 1871, J. H. Barnett becomes ill and sends word to Rudisill he wishes to see him about the yet unsettled sale of said sixth interest. Rudisill calls and agrees to and shortly thereafter does execute the mortgage to J. H. Barnett, dated December 13th, 1871, upon the agreement and understanding that said one-sixth interest be conveyed to N. B. Freeman and that Freeman assume and pay for the same what Rudisill was to pay therefor; p. 237.

Rudisill does not know whether such conveyance was ever made; the evidence does not show that it was. In fact the evidence shows affirmatively a total failure of consideration for said mortgage and tends strongly to show affirmatively that no legal delivery of said $10,000 bond ever was made; pp. 232 and 236.

A. G. Barnett testifies as to the giving of the bond and mortgage by Rudisill and the consideration therefor, but in his last deposition questions 43, 44, 50, 51, 52, 53, (pp. 227 and 228), he shows that he has no personal knowledge and he refuses to obey a subpœna duces tecum to produce the books relating to the paper mill and business subsequent to July 15, 1869, questions 29 and 30, p. 225 and subpœna p. 233.

Rudisill is then the only witness who has any knowledge of the agreement and execution of said bond and mortgage. Record pp. 235 to 239.

J. H. Barnett dies testate, February 2d, 1872, leaving in his brother's custody his will; pp. 15 to 18.

A. G. Barnett and his sisters read over the will together soon after J. H. Barnett's death, and all believe and understand the *will by its terms* to confer the control and disposal of the personalty and management and settlement of the entire estate on A. G. Barnett, and in that belief the sisters leave all property of the estate in charge of their brother, who assumes the management thereof, runs the paper mill and business, collects what is owing to the testator and pays the debts, leaving only the Bissell loan and the Rudisill bond and mortgage unsettled, collecting and expending for the estate, outside of the paper mill business, $1,300. Dep. Mary Wall and Susian R. Shoaff; pp. 147 to 149 and 153 to 158. A. G. Barnett, pp. 123, 124, 126, 127.

The brothers and sisters were intimate and the relations of trust and confidence existing between the brothers were known to the sisters, who assented to A. G. Barnett's settling the estate, making no objection till after this suit was instituted in 1879, and then only to one act, i. e. his release of a part of the mortgage from Rudisill to J. H. Barnett; deps. last cited.

In January, 1875, while A. G. Barnett is still managing the interests of his deceased brother in the paper mill and business, Rudisill applies to him to release a part of the J. H. Barnett mortgage so that he may make a contemplated sale. A. G. Barnett informs Rudisill that J. H. Barnett has given him power to release mortgages and do all other things he may consider necessary for the best interest of the estate; p. 238.

A. G. Barnett then releases the lien of the J. H. Barnett mortgage on $5,000 to $6,000 worth of the land covered by it, and Rudisill executes to him for the benefit of J. H. Barnett's estate the mortgage of January 25, 1875, p. 171, which was a first lien on $1,100 to $2,600 worth of land, and a second lien on property worth $20,000 to $25,000; the first lien on the latter as well as on the released property being the same, i. e. the annuity mortgage which was paid to July, 1875, and constituted an encumbrance of less than $6,000; pp. 249, 256, 257.

Defendants, Burgess Zollinger, and the ancestor of defendants, Kamms, then buy the property so released by A. G. Barnett, and several acres beside, paying $10,000 therefor, knowing that all except $200 thereof was used in paying off tax and other liens upon the property, and believing that the J. H. Barnett mortgage is fully paid; pp. 141 to 143.

Mrs. E. Rudisill knowing nothing of the J. H. Barnett mortgage, at her son's request, releases to Burgess Zollinger and Kamm such purchase from the lien of her annuity mortgage "to give them whatever right she had in the land so that Henry (Rudisill) could sell"; pp. 222 to 224.

Henry J. Rudisill executes to Burgess Zollinger and Kamm a deed of said purchase with full convenants; pp. 69 and 70.

The mortgage by Rudisill to J. H. Barnett was taken with the knowledge and nnderstanding on the part of the brothers Barnett and Hough that it was second to the annuity mortgage. But Bissell & Co. know nothing of the $10,000 bond or the J. H. or A. G. Barnett mortgage till this suit is brought, and perhaps not then.

Hough, their agent, the originator of the plan by which the $10,000 bond and J. H. Barnett mortgage were procured of Rudisill, is also consulted about the substitution of the A. G. Barnett mortgage for that part of the lien released by A. G. Barnett and makes no objection; pp. 238, 239.

The A. G. Barnett mortgage is recorded the day following its execution; p. 244.

Burgess Zollinger and Kamm plat a part of their said purchase, distribute plats thereof, advertise and put on the market the lots and sell a few; p. 139.

A. G. Barnett and J. H. Barnett were partners in everything and held and enjoyed their property in common during the life of J. H. Barnett. They kept no accounts and neither charged nor credited the other with anything. J. H. Barnett had implicit trust and confidence in A. G. Barnett, who during the last years of J. H. Barnett's life, managed almost everything for him; pp. 120, 228, 115, 116, 117.

A. G. Barnett informs his sisters, Mrs. Wall and Mrs. Shoaff, of the release and substituted security soon after taken and they made no objection; pp. 126, 127.

The annuity mortgage is paid in full by Rudisill to July, 1875; p. 224. At the date of the release, by A. G. Barnett, the property was worth $5,000 to $6,000, and was wholly unproductive. The property mortgaged in lieu of it was worth upwards of $25,000, of which $2,000 to $3,000 worth, i. e. tracts 4 and 5 plat, p. 249, were free from any other lien and the remainder was, in common with the land released, covered by the annuity mortgage. The substituted security covered a then valuable flouring mill which was doing good business.

Rudisill pays no interest on the J. H. Barnett bond nor anything farther on the annuity mortgage.

The annuity mortgage covered tracts of land, not included in either the J. H. Barnett mortgage or substituted security, A. G. Barnett mortgage, but the extent and value is not found.

Rudisill afterwards sells his equity of redemption in one-half the mill property to John Hill for $12,500, and goes to California. Three years later (1878) A. G. Barnett and the firm of Freeman & Barnett go into bankruptcy and A. G. Barnett gets a discharge. He (A. G. Barnett) does not schedule his indebtness to Bissell & Co., and J. H. Barnett's interest in the paper mill and business is not scheduled as firm assets; pp. 140, 133, 227.

J. J. Kamm dies leaving an insolvent estate to his heirs, the defendants Kamm; p. 224.

A. G. Barnett gets possession of the $10,000 Rudisill bond, (the evidence does not disclose how), and takes it with the J. H. Barnett mortgage to Bissell's attorney "to foreclose;" p. 123.

Bissell files his bill (1879) asking, among other things, a reformation of the J. H. Barnett mortgage, so as to include the mill property: pp. 1 to 8. A. G. Barnett then takes the mortgage on the mill property (substituted security) to Bissell's attorney to foreclose; p. 127. Bissell files a supplemental bill, setting up the same and praying a foreclosure of both that and the J. H. Barnett mortgage; pp. 22 to 24. Subsequently Bissell amends his bill and prays alternative relief, *i. e.*, to foreclose one or the other; pp. 34 to 41.

Part of the beneficiaries of the J. H. Barnett estate file a cross-bill urging a foreclosure, for their benefit, of the J. H. Barnett mortgage; pp. 86 to 92. A. G. Barnett files a plea of discharge in bankruptcy and a cross-bill seeking foreclosure of the substituted security for his benefit; pp. 85 and 165 to 171.

The assignees of the annuity mortgage file a cross-bill to foreclose that (pp. 44 to 49) and Burgess and the Kamms file a cross-bill praying to have their title quieted as to the J. H. Barnett mortgage or to be subrogated to the substituted security and that the beneficiaries of the J. H. Barnett mortgage (Bissell and the Barnett devisees) contribute at least pro rata to the payment of the annuity mortgage; pp. 203 to 211. The issues are joined by answers to the bill and cross-bill and replications thereto.

CONCLUSIONS OF FACT.

1st. Hough either was a general agent of Bissell & Co. with power to bind the principal as to the *substituted security*, and partial release, as well as to the $10,000 bond and J. H. Barnett mortgage *or* he acted without authority from Bissell & Co. as to either the $10,000 bond, J. H. Barnett mortgage or A. G. Barnett mortgage.

2d. The original consideration for the Rudisill bond and mortgage to J. H. Barnett entirely failed.

3d. The sole consideration for the A. G. Barnett mortgage, as between Rudisill and Bissell or A. G. Barnett or any of the beneficiaries of J. H. Barnett's estate is the release of a part of the Burgess, Zollinger & Kamm purchase, covered by said mortgage to J. H. Barnett.

4th. Neither Bissell nor J. H. Barnett's devisees are privy to the release of the annuity mortgage to Burgess, Zollinger & Kamm by Mrs. Rudisill, nor as between them and the releasor was there any consideration for such release.

5th. As between Mrs. Rudisill and Burgess, Zollinger & Kamm, the money paid H. J. Rudisill is the consideration for such release, and they are in equity and good conscience as much the purchasers of her lien for purchase money on those lands as Bissell or the Barnett devisees are creditors of Rudisill for money used in their business by the Barnetts and *possibly* afterwards credited to Freeman.

6th. J. H. Barnett's *intention* in executing his will was to empower A. G. Barnett *by its terms* to absolutely control and dispose of his personal estate.

7th. The substituted security was much more valuable than that released.

8th. The devisees of J. H. Barnett are guilty of gross negligence in permitting their security to deteriorate and become involved for nearly five years after default.

Appellants if their assignment of error is sufficient to raise any question attack only that part of the decree which quiets title in Burgess the Kamms, Simons, Bass and Zollinger to the real estate released from the J. H. Barnett mortgage, and that *decree is joint* against appellants and others, viz., Abraham G. Barnett, Nancy C. Barnett and George P. Bissell.

There was no summons and severance as to the latter, nor any refusal to join in the appeal, nor does the record show any cause for non-joinder. It is respectfully submitted the appeal should therefore be dismissed. Masterson & Herndon, 77 U. S. 416.

ARGUMENT.

Should this Hon. Court be of the opinion that any question discussed in appellants' brief ought to be considered the following argument is submitted:

Appellants in support of their position quote excerpts from three Indiana decisions, but neither have even a remote application; for in all three the question is whether the Probate Court has jurisdiction to grant letters of administration when not authorized by statute; viz., in 26 Ind. *on the estate of a non-resident who left no assets in the State*, in 45 Ind. *while letters duly issued to an executor were in force*, in 103 Ind. *after administration had, the final order of settlement remaining unrevoked.*

Their quotations from Kent are still less in point; for, as a fact, resident executors were not required to give bond except on application of one interested in the estate when danger of loss was apparent. Mandeville vs. Mandeville, 8 Paige 475. Holmes vs. Cock, 2 Bar. ch. 426. Wood vs. Wood, 4 Paige 299.

The *nomination* of an executor at common law was *alone* sufficient to constitute a will if duly executed; and by a rule of law the title to the testator's personalty vested in the person nominated executor with as absolute power of disposal as the testator had. While in Indiana, §236 R. S., 1881, and many others state the common law is adopted, still the general policy is to limit and change such rule of law, and place an executor, *nominatim*, in the position of an administrator and require of him statutory administration. The nomination of an executor without testamentary directions or powers being given the effect merely of a personal preference of the testator as to the individual whom the Court should authorize. The mass of our statutory law and judicial decisions, however, indicate a very strong disinclination to trammel the citizen in the testamentary control and disposition of his property, further than to cut off entails and perpetuities and prevent frauds on creditors; and testamentary gifts, trusts, powers, requests, and directions whether affecting real or personal property are almost universally respected and enforced, even though in apparent conflict with statutory policy. In many Southern non-commercial communities where men of means in former years were in the habit of choosing their near friends to care for their estate, and as a mark of esteem and confidence providing in their wills that no bond should be required, this peculiarity was recognized by the legislatures in special provisions, to the effect that no bond should be required "unless the court at any time should have good reason to suspect the executor of fraud or maladministration."

In Clark vs. Niles, 42 Miss. 460, a widow acting as executrix, without bond under a will containing such direction, was on petition of a creditor cited to show cause why she should not give bond. The Court in passing on the effect of such a statute say "this statute only reiterates what has been the action of Courts having jurisdiction of the settlement of estates of deceased persons."

Among the states in which similar legislative provisions have been enacted are Texas, Mississippi, Kentucky and Virginia. See Atwell vs. Kelm, 7 Bush 504. Clark vs.

Niles, 42 Miss. 460. Fairfax vs. Fairfax, 7 Grattan 36. Langley vs. Harris, 23 Texas 563.

Testamentary direction controls or is held to be without general sweeping statutory provisions as to sale of a testator's real estate. McDermot vs. Lorillard, 1 Edw. Ch. 272. Minuse vs. Cox, 5 Johns Ch. 441. Champlin vs. Champlin, 3 Edw. Ch. 602. Goods of Smith L. R. I. P. & D., 717.

In Minuse vs. Cox, supra, where a testator authorized his executors and their survivor as to the residue of his estate "to sell and dispose of the same by public auction or private contract as to them or him should seem expedient," the court held that the manner and time ot sale are lett entirely in the sound discretion of his executors irrespective of statute.

In McDermot vs. Lorillard, supra, in construing a statute requiring that "sales of real estate by executors in pursuance of authority given by any will be made upon like notice etc." The Chancellor interpolates as indicating the true meaning "*when not otherwise directed, required or indicated by the authority itself.*"

In "Goods of Smith," supra, a testator had closed a duly executed codicil with the following words: "I give my wife the option of adding this codicil to my will or not as she may think proper or necessary." The Court held the condition or power valid.

The legislature of Indiana never intended to deprive the citizen of all power to control the manner ot the settlement of his estate and disposition of his property. For, touching the sale of land or an interest therein, which is more zealously guarded than personal property, they provide, Sec. 2359. Ind. R. S. 1881, that when the will directs it to be sold for payment of debts or legacies "the executor shall proceed to dispose of the estate and apply the same according to the provisions of the will" and prescribe certain formalities "*unless different provisions be made in the will*" and in sec. 2362, directly recognize the testator's right to dispose of his estate without statutory formalities by providing a simple form of conveyance that shall be sufficient to convey the estate to the grantee as fully as any other form of conveyance "if by the provisions contained in a will the executor be required or authorized *without the intervention of a court* to execute a conveyance of any of the real estate of the decedent." By tacitly conceding that by "provisions contained in a will" one may override the general statutory provisions and restrictions as to security, terms, mode and conditions of sale of land or an interest therein, the legislature has expressed most emphatically its general policy and intent to leave the citizen free and untrammelled in the disposition, control and management of his estate by will.

By reference to the statutes, of Indiana, touching the administration of decedent's estates and trusts, it will appear that the legislature never expressly interfered with testamentary requests, directions; powers and trusts further than to give parties interested in the property the right to protect it, if there shall be danger of loss, by application to the Circuit Court for necessary relief.

The statute quoted by appellants as to letters, oath, bond, etc., of executors, it will be seen, applies *in terms* only to one "*named in the will as executor*," and does not purport to affect or control testamentary trustees or donees of powers, nor specific requests or directions of the testator. From a careful consideration of all Indiana statutes affecting decedents; estates and trusts and powers, it seems that, while creating ample and effective remedies which either creditor, heir, or legatee may resort to, if the interest of either is threatened, the law-makers have been careful not only to avoid *in terms* taking from the citizen the power to control the management and disposal of his estate, but, also, to indicate by express provision that such is not their policy.

Sections 2995, 2996 and 2997 R. S., of Indiana, quoted by appellants are from a special statute providing for the sale of real estate held in trust in certain cases, Session Laws of 1875, page 117, and were not enacted till after all acts of A. G. Barnett, which are questioned by appellants had been performed.

The law in full on the subject of Powers and Trusts in Indiana, at the date of the various acts performed by A. G. Barnett is found in "an act concerning trusts and powers," approved, June 17th, 1852, I. Gavin & Hord, 651.

This act to a large extent embodies common law principles, and the Court having jurisdiction over express trusts and powers in trust, i. e., Circuit Court of the proper county might, and, on application of any one interested, would require bond of an acting trustee, especially if necessity therefor existed ; but the giving of bond is not a condition precedent to the valid exercise of the powers conferred. Iles vs. Martin, 69 Ind. 114.

A trustee may release or compound a debt due the estate if he act in good faith, being answerable to the cestui que trust for loss from gross negligence. Perry on Trusts, §482.

"Courts of equity look to the end and design of the parties in considering the extent of powers, and to a substantial rather than literal execution of the power." Wilson vs. Troup, 7 Johns Ch. 25.

As early as Liefe vs. Saltinghouse, 1 Mod. 189, it was held "that where a devison gives to another a power *to dispose*, he gives to that person the same power that he himself had to dispose."

In construing powers the intention of the parties gathered from the whole instrument, considering the circumstances of the case governs. Wilson vs. Troup, 7 Johns. Ch. 25. Goodtitle vs. Funucan, Doug. 565. Pomeroy vs. Partington, 3 Term Rep. 362. 7 Com. Dig. title Poiar 8. Smith & Taylor, 21 Ill., 296.

And the intention of a testator must control in construing his will, Ridgeway vs. Manifold, 39 Ind. 58, unless inconsistent with established rules of law. Jackson vs. Hoover, 26 Ind. 511. Smith vs. Bell, 6 Peters 68.

If there be anything to indicate that testamentary powers or trusts are conferred upon the individual rather than the officer whether by use of his name or by reason of indicated confidene in the person, an executor, *virtute officii*, or administrator, with the will annexed receives no authority therefrom; Perry on Trusts §500. Taintor vs. Clark, 13 Metc. 220. Conklin vs. Egerton, 21 Wend. 430. Warfield vs. Brand, 13 Bush 77. Bolton vs. Jacks, 6 Rob. (N. Y.) 166. And one who is both executor and trustee will be presumed after the debts are paid and the regular period for administration expired to hold whatever property he may have in possession as trustee, notwithstanding he may claim to act and sign transfers *as executor*, State vs. Chester, 51 Md., pp. 375, 376, He cannot by his own election continue the office of executor, ib. p. 379.

The decision in Hunter vs. Bryson referred to by appellants is correct and follows literally the direction of the will. The dictum quoted by appellants as to evading provisions of a testamentary system is purely *obiter*.

In Bankhead vs. Hubbard, cited by appellants, the Court refused to hold letters without security, void, and did decide only that the "Probate Court has a large discretion under the law not to be controlled by this Court unless in case of outrageous abuse resulting in serious injury."

I.

The release of A. G. Barnett is valid as the act of a surviving joint creditor.

J. H. and A. G. Barnett were joint debtors to Bissell for $8,000. Granting, for argument sake, what appellants claim, viz.: That $5,000 of the $8,000 was by the brothers Barnett immediately put into the assets of the St. Joe Paper Mills and credited to their partner Freeman on the firm books, and that Rudisill's bond and mortgage were executed as security or indemnity for the repayment of the same by Freeman; then the brothers Barnett became the joint creditors of their partner Freeman and of Rudisill as his security, and each would be entitled to receive or collect from the debtor the money due both, and receipt or release their claim and securities therefrom, while the other was living or as survivor after the other's decease.

This position is so fully sustained by the leading case of People vs. Keyser, 28 N. Y., 226, that I can do no better than cite as argument that part of the opinions of J. J. Selden and Balcom, found on pp. 228 to 232 and 234 to 236.

A release by one of several having a joint personal interest is binding on the others. *Decker vs. Livington*, 15 Johns, 482; *Wheeler vs. Curtis*, 11 Wend. 663; *Bradley vs. Boynton*, 22 Maine, 290; *Hall vs. Gray*, 54, id. 231; *Wishart vs. Legro*, 33 N. H., 182; *True vs. Huntoon*, 54 id. 121; *Grossman vs. Lauber*, 29 Ind., 622; *Smith vs. Wiley*, 22 Al., 403; *Stapleton vs. King*, 33 Iowa, 35." *Myrick vs. Dame*, 9 Cush. 248; *Blake vs. Sanborn*. 8 Gray, 154; *Martin vs. McReynolds*, 6 Mich. 70; *Emerson vs. Kenwoer*, 8 Pick. 63.

II.

The release of A. G. Barnett is valid because of power conferred on him by his brother.

The two parcels of land mortgaged by J. H. Barnett to Bissell are each valuable improved city property producing a large income. By clauses one and two of J. H. Barnett's will, a life estate is devised in the one to appellant Mary Wall, and in the other to appellant Susan B. Shoaff—with remainder in each each case to members of A. G. Barnett's family—contingent remainder to A. G. Barnett himself. Whether the first remainder is to a son or to the wife and son of A. G. Barnett, in the event of the son's surviving the life tenant is not certain from the terms of the will.

By clauses three and four, A. G. Barnett and his children then living, are made the beneficiaries of all the remainder of J. H. Barnett's real estate except a life lease in a small tract to Susan B. Shoaff.

The remainder of his will is as follows, viz.:

Fifth. *Now, as to my interest in the paper mill & business carried on at the city of Fort Wayne under the name of Freeman & Barnett—which is regarded as one third in extent—of said* *business, effects, real, & personal, &c, &c, stock assets machinery—dividends due &c. I devise & bequeath subject to the conditions & agreements performed or unperformed—which were named at the time I became a party in interest in said paper business so carried on by & in Freeman & Barnett's name, & which said conditions and agreements are known to my brother, A. G. Barnett.* I give & bequeath unto my said brother A. G. Barnett, & to my nephews James Barnett Wall, & Charles W. Wall, sons of my sister Mary A. Wall—all my interest in the paper mill & busines aforeraid, real & personal or otherwise—so carried on & owned by said Freeman & Barnett. To have & to hold to each of said devisees or legatees, three in number, so named, one full third of my said interest in said paper business, mill, &c—*The sole control of the respective interests of said James B—& Charles W. Wall—shall be under the control of my brother, A. G. Barnett,* until the said Charles W. shall arrive at the age of twenty-one years, and of the interest of said James B. Wall—to be under the control of said A. G. Barnett until said James B. shall reach the age of twenty-five years. The profits arising out of said interest so bequeathed to said Charles & James B. respectively—shall be at reasonable periods, each year paid said legatees respectively by said Barnett, or by any other person who may be authorized to control said interests in the progress of said business, by law or otherwise—

And I hereby give the said A. G. Barnett the right to sell said interests of said Chas. & James B. if he shall deem such sale expedient & for the best interest of said Chas. & James—He, the said A. G. Barnett, first giving said Chas. & James security for faithfully accounting to them for the proceeds of said sale—Or if he shall desire to buy said interests or either of them—before either shall be of age—then some third party shall qualify as guardian & proceed to sell the same to A. G. B. under order & authority of the law.

Sixth. I name my brother, A. G. Barnett my executor to act himself, or jointly with one he may cho-se—if acting alone, then he shall & may do so without bond—*as such executor*—but it acting with another both shall give bond—& take out letters testamentary—& proceed according to law—But if he shall act alone —then, as executor he shall have authority under this will to proceed as if he had letters testamentary—to execute the trusts devolved on him as executor, as also those which may incidentally arise in the execution of this trust as executor;—but not any athers—arising out of a different relation—such as trustee or guardian of some of the parties named herein or of some of the trust funds named hereinbefore.

He shall have power to proceed to collect all debts judgments or choses in action due me at my death—all rents due me at my death, of any & all my real estate, except the homestead—& to have control of & dispose of all my personal property, moneys, & effects, reducing them to availibility—& to collect all rents on the lots devised respectively, located in the city of Fort Wayne, until such rents & the reasonable use of the whole homestead place, including that devised to Mrs. Susan Shoaff & to himself—until such funds so arising from rents, use of homestead, moneys, personal property, &c—shall be enough to pay my debts—funeral expenses—debts of last illness—& to purchase a lot in Lindenwood cemetery—properly & tairly improve it—pay for exhuming the remains of my father & mother, their interment and the erection of a monument suitable to their condition in life, on said lot, And this shall be done speedily as the nature of the business shall allow—After which the devisees respectively herein lastly named & incidentally referred to, shall control said property as the same is intended in the respective clauses wherein said property is devised—

Had the testator stopped with the first statement of clause six viz: "I name my brother, A. G. Barnett my executor to act himself or jointly with one he may choose," the statute quoted by appellants as to formalities required of persons "named in the will as executor" would be pertinent.

But the testator attempts expressly to confer the powers of an executor upon his brother A. G. Barnet by the remainder of the first two sentences of said clause viz.: "If acting alone then he may do so without bond as such executor; but it acting with another both shall give bond and take out letters testamentary and proceed according to law. But it he shall act alone—then as executor *he shall have authority under this will to proceed as if he had letters testamentary* to execute the the trusts devolved on him as executor as also those which may incidentally arise in the execution of this trust as executor."

And the testator evidently believing such language broad enough to cover the special power to sell and trusts as guardian contained in clauses second, fourth and fifth then excepts such special trusts from "the authority under this will."

That by the foregoing language J. H. Barnett did *not* intend his brother to give bond and submit to the statutory formalities required of "persons named in the will as executor," and that he *did* intend to empower his brother thereby to administer his estate and perform all acts that a qualified executor might do is too evident to admit of discussion.

That creditors of J. H. Barnett might have required statutory administration if their debts were not paid is admitted; but in view of the authorities cited in the opening of this argument, it is submitted the devisees of J. H. Barnett cannot question acts done within such testamentary direction, even had the testator made no further provision.

The remainder of clause six, however, *in express terms confers on A. G. Barnett the "power" among other things; "to have control of and dispose of all my personal property moneys and effects,"* and collect the rents of all the devised real estate until the fund arising therefrom shall be sufficient to pay all liabilities of the estate and provide a fund of uncertain amount for certain other trusts vested in A. G. Barnett.

By clause five, one-third of testator's interest in the business and property real and personal of the St. Joe Paper Mills is devised and bequeathed to A. G. Barnett and the sole control of the remainder for a long term of years is also expressly conferred upon A. G. Barnett "subject to the conditions and agreement, performed and unperformed," named when the testator acquired his interest therein, "which said conditions and and agreements are known to my brother A. G. Barnett."

What these "conditions and agreements" were and whether they related to the joint loan from Bissell and the transactions with Freeman and Rudisill was not known and could not be except through A. G. Barnett. Rudisill testifies, p. 239: "Mr. A. G. Barnett was first to inform me of the powers given him by his brother J. H. Barnett for the purpose of avoiding all litigation and controversies on the part of those interested in the estate," and p. 238, "I informed him (the attorney making abstract and search for Burgess, Zollinger and Kamm) that Mr. A. G. Barnett, as executor of J. H. Barnett's estate, had told me that the power had been expressly conferred upon him by his deceased brother to release mortgages and do many things that he might consider for the best interests of the estate to do."

A. G. Barnett was a tenant in common of part and remainder man as to the balance of testator's real estate.

The latter part of clause six, then vested in A. G. Barnett a power in trust, *coupled with an interest,* giving him the absolute irrevocable disposal of the personalty and use of the realty for an indefinite period for purposes in part administrative and in part without the province of ordinary administration.

In view of the peculiarly intimate social and business relations of the brothers Barnett, their confidence in each other, their joint controlling interest in the St. Joe Paper Mills, their joint debt to Bissell for the $8,000 mostly invested in that business, the yet incomplete sale to Rudisill of an interest in the paper mills, the Rudisill bond held by Hough and its connection with their loan of Bissell and such incomplete sale, the reference in clause five of the will to the conditions and agreements, performed and unperformed, known to my brother, considered in the light of A. G. Barnett's subsequent statements to Rudisill, and taking the will as a whole, the conclusion is well night irresistible that J. H. Barnett had the transaction with Rudisill in mind when drawing his will and wished to entrust the settlement of that entirely and exclusively to his brother's discretion.

Rudisill gave and A. G. Barnett received the substituted security and released the land sold to Burgess, Zollinger and

Kamm in the best faith, believing, as was the fact, that the substituted security was better than that released.

A power in trust over personal property can, without question, be created by will—and the fact that the release purports to be executed as executor, is immaterial if the power to release in any capacity existed. *State vs. Cheston* ,51 Md. 352.

"There is no magic in particular words, and any expressions that show unequivocally the intention of the parties to create a trust will have that effect." Tobias vs. Ketchum 32 N. Y. p 827; Sheets Estate 52 Pa. 257; Conklieg vs. Egerton, 21 Wend. 430; Dunning vs. Ocean National Bank 61 N. Y. 497; Bolton vs. Jacks 6 Rob. N. Y. 166.

In Taintor vs. Clark 13 Met. 220 a testator devising and bequeathing his entire estate, "real, personal and mixed," to various beneficiaries, concludes as follows:

"I hereby nominate and appoint Captain Jonas Tucker, of Carlton, to be the sole executor of this my last will and testament and hereby authorize and fully empower him to sell and convey such of my property as in his judgment will best promote the interest of all concerned, to raise the two thousand dollars for the use of my wife and daughter and pay my just debts."

Said Tucker declined the trust as executor, and an administrator with the will annexed was appointed, who, having qualified, sold at public auction the property to pay debts and legacies. The validity of such sale was contested by writ of entry to recover a part of the premises sold.

The court says: "The administrator had no power to sell by the will; for that was a power expressly given to Jonas

Tucker and a part of the proceeds of the sale was to be held by him in trust which might continue for an indefinite period of time after the debts of the deceased should be paid, and his duties *qua* executor should be fully performed. A personal confidence was reposed in the executor and trustee to sell such property 'as would most promote the interest of all concerned.' Land was also given to the executor in trust for other purposes; so that it is clear he was both trustee and executor under the will; and the power to sell being coupled with a trust has not been relinquished. The administrator had therefore no power to sell under the will."

In this case, as in the case at bar, the power given by the will included the raising of money to pay the debts as well as for purposes totally foreign to the powers and duties of an executor as such.

In Conklin vs. Egerton, supra, an early and leading case in which the distinction between testamentary trustees and executors and the source of their powers is clearly drawn the court say—"Even a trustee of the testator's personal estate, named and appointed as such by the will, is not an executor. When a man was appointed by the testator *trustee of his last will and testament*, and was committed by the ecclesiastical judge for not exhibiting an inventory and account, the king's bench discharged him on *habeas corpus*, saying that, in this character, the judge had no jurisdiction over his person. *The King vs. Jenkins*, 1 Dowl. & Ryl., 41."

III.

1. J. H. Barnett's devisees are not entitled to the benefit of Mrs. Rudisill's release to Burgess, Zollinger & Kamm, of her annuity mortgage, even though the release by A. G. Barnett *were void in toto. 2. Upon the same hypothesis i. e. the invalidity of A. G. Barnett's release, Burgess, the Kamms and Zollinger's grantees are entitled to be subrogated to the substituted security, (A. G. Barnett mortgage.) 3. J. H. Barnett's devisees are not entitled to a foreclosure, and sale of the Burgess, Zollinger & Kamm purchase without contributing at least a pro rata share toward removing the prior lien, i. e., the annuity mortgage.*

J. H. Barnett's devisees neither gave anything for the release to Burgess, Zollinger & Kamm of the annuity mortgage, nor were privy to or cognizant of it, nor in any way acted upon the faith of it; and their devisor acquired the security upon the express understanding that it was second and subject to the annuity mortgage. Upon what ground can they claim any benefit under and by virtue of such release?

The right ot Burgess, the Kamms and Zollinger's grantees to the benefit of the substituted security given by their grantor to remove an incumbrance from their purchase, indirectly for their benefit and upon full compensation by them paid to said grantor, cannot be questioned if the direct benefit they were to receive from the release ot the J. H. Barnett mortgage be destroyed by the intended beneficiaries ot such substituted security. Farmer's Loan and Trust Co. vs. Walworth 1 N. Y. 433.

The rule ot "sale in the inverse order ot alienation" has never obtained in the courts of Kentucky, Tennesee, Iowa and other most respectable courts. Parkman vs. Welch 19 Pick. 241; Dickey vs. Thompson 8 B. Mon- 312; Jobe vs O'Brien 2 Hump 34; Bates vs. Ruddick 2 Iowa 423; Barney vs. Myers 28 Iowa 578; I Younge & C. Ch. 401; 1 Dev. Eq.

314-317. In this state the rule cannot yet be regarded as a rule of property. And where such rule does obtain the record is not constructive notice to a prior mortgagee, nor is the rule applied as to him without actual notice of the fact and order of subsequent alienation. Matteson vs. Thomas 41 Ill. 110. Nor is the rule applied when it will work injustice to the debtor or third persons. I Hilliard on Mortgages 336, 224. And the rule when applied affects only the interests of successive *purchasers*.

Successive *mortgagees* of different parts of encumbered premises must bear pro rata the burden of such prior encumbrance. Pancoast vs. Duval 26 N. J. Eq. 445 ; I Hilliard on Mortgages 337, §27 ; and as between a second mortgagee and a subsequent purchaser of different portions of premises covered by a prior mortgage, the mortgaged portion must first be sold and then the portion absolutely conveyed. Kellogg vs. Rand, 11 Paige 59.

If then, the J. H. Barnett mortgage be held a valid lien upon the Burgess, Zollinger & Kamm purchase, Burgess, the Kamms and Zollinger's grantees as beneficiaries of the substituted security, are entitled to have a pro rata share of the annuity mortgage paid by the holders of the J. H. Barnett mortgage . but they have in addition the higher equity of bona fide purchasers of a part of the premises covered by the J. H. Barnett mortgage; they may be considered equitable assignees of Mrs. Rudisill's purchase money lien (i. e. the annnity mortgage) on the same part of said premises, and their money, given in good faith for the land, paid off tax, judgment, and other liens on the same amounting to upwards of $9000.

In view of the foregoing, if the release of A. G. Barnett were invalid the least a court of equity would do for the purchasers would be to require the beneficiaries of the J. H. Barnett mortgage to pay one half of the annuity mortgage lien before selling the Burgess, Zollinger and Kamm purchase.

IV.

In view of all the circumstances the equity is with Burgess, the Kamms and Zollinger's grantees, irrespective of the power conferred upon A. G. Barnett by his brother's will.

The substituted security was a first lien on land east of the river worth, then and still, $1,500 to $2,500 and a second lien on the best water power within 200 miles, a flouring mill then in good repair and doing a good business, and some land—altogether worth at that time $25,000 now worth $17,000 to $20,000 only because the mill was allowed to run down and decay. The security released was a junior lien on $5,000 to $6,000 of unproductive land now worth $6,000 to $7,000. The first mortgage lien on both encumbered tracts being the annuity mortgage then paid to date and amounting to less than $6,000 upon the annuitant's expectation of life. Specific liens for taxes &c. prior to all mortgages encumbered the released security and judgments to a large amount also encumbered the same land.

Rudisill gave and A. G. Barnett accepted the substituted security in the best of faith. It was so much more valuable and available than the security released, that any business man would have eagerly made the exchange in A. G. Barnett's place.

The money paid by the purchasers removed the tax and other liens from the improved land retained viz. parcels 1 & 3 worth $2,000 and the head race of the mill. A. G. Barnett had practically administered his brother's estate with the consent and concurrence of his sisters collecting all claims and paying all debts except the mortgage in controversy and still held the J. H. Barnett mortgage. He soon after informed his sisters Mrs. Wall and Mrs. Shoaff of the substituted security and release, and they made no objection and did not think of so doing till advised by counsel in this suit four years later.

In the meantime they let the securities stand although in default, allow a one half interest in the flouring mill to be sold for $12,500 and the income rents and profits from their security, ample to pay their debt to slip through their fingers, and then allow the mill to go to ruin year by year and the annuity to accumulate against the property without attempting to make their debt out of it.

Any interest Mrs. Wall and Mrs. Shoaff may have had in the released security was their own separate property subject to their disposal and control in every respect as if they had been unmarried, under the laws of Indiana. And they cannot object to A. G. Barnett's release for they not only confided to him the management, control and disposal of the personal estate of J. H. Barnett in the beginning but subsequently ratified all his other acts and acquiesced in that. Wharton on Agency, §72.

Unless the benefit of Mrs. Rudisill's release to Burgess, Zollinger & Kamm be accorded to J. H. Barnett's devisees, or unless by some legal legerdemain they are accorded the benefit of both the released and substituted security, it is suicidal for them to question the validity of A. G. Barnett's release.

The substituted security would now produce $1,500 to

$2,000 without advancing anything and nearly if not entirely enough to pay the balance of the Rudisill bond by advancing or bidding the amount of the prior lien. While the released security would produce nothing without an advance on prior liens and even then not more than $1,000.

But for appellant's laches they could have made the amount of the Rudisill bond by foreclosure of the substituted security without advancing a cent; for a half interest in the property was bought for $12,500 and the Rudisill bond and annuity mortgage together amounted to less than $11,000 after the right to foreclose acrued—and the substituted security and unreleased portion of the original security, then producing a large annual income, were in good condition and repair and worth $27,000.

A court of equity will hardly assist appellants to take appelee's property bought on the faith of acts done with their concurrence under the excuse that it is the easiest way to save themselves from the consequences of their own neglect.

Rudisill does not contest Bissell's bill nor appear to appellant's nor A. G. Barnett's cross bill.

But the evidence is conclusive that the original consideration agreed to be given for his bond and mortgage entirely failed.

And it does not appear that the purchase by Freeman for which Rudisill consented, in November 1871, to let his bond stand as security was ever carried out. If not there is no consideration to support the execution of the J. H. Barnett mortgage and it could not be foreclosed as against these purchasers.

The substituted security would be supported as a compromise.

On the other hand, if the transfer was made to Freeman he becomes a *neccessary party* to Bissell's bill and appellant's cross bill and the question having been raised by answer appellants must fail.

Respectfully submitted,
SAMUEL R. ALDEN,
Counsel for Burgess and Kamms.

A map showing in blue outlines the substituted security—in red the J. Barnett mortgage—and in green the unreleased part of the J. H. Barnett mortgage is filled herewith.

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JAMES H. McKENNEY,
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IN THE SUPREME COURT

OF THE

UNITED STATES.

PHILADELPHIA
BAR
ASSOCIATION

MARY WALL, ET AL.,
Appellants,
VS.
GEORGE P. BISSELL, ET AL.,
Appellees.

BRIEF FOR THE APPELLEES, SIMONS, BASS, HOFFMEISTER, McCURDY, AND HATTERSLEY.

By R. S. TAYLOR.

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STATEMENT OF THE CASE.

The statement of facts contained in the brief for the appellants is not, in my opinion, either accurate or complete. Without undertaking to point out its errors and defects in detail, I submit one of my own, as the most convenient course.

Oct. 30, 1860, Henry J. Rudisill executed to Elizabeth Rudisill, his mother, a mortgage to secure to her an annuity of $800 during her life. The mortgage does not state the exact amount of land, but it was above a hundred acres, and embraced a water power and grist mill. Record, page 31-2.

July 15, 1869, John H. Barnett and Abraham G. Barnett executed to Geo. P. Bissell & Co. eight bonds for $1,000 each, and on the same day John H. Barnett, executed to Geo. P. Bissell a mortgage to secure said bonds, conveying parts of lots 105 and 106 in the city of Fort Wayne, Indiana. Record, page 8 to 13.

This money was borrowed to be used in the business of a paper mill in which the Barnetts and one N. B. Freeman, who is not a party here, were partners. Five thousand dollars of the money was to go, and did go to the credit of Freeman, and for this sum Henry J. Rudisill was to become, and did become, in the manner stated below, surety for Freeman. Dep. of Freeman, page 113 to 115.

July 15 1869, Henry J. Rudisill executed to J. H. Barnett a bond reciting the loan aforesaid, and that he had received $5,000 of the money, and conditioned for the payment of five of the bonds. Record, page 14.

Dec 13, 1871, (two and a half years after the bond,) Rudisill executed to J. H. Barnett a mortgage to secure his bond, covering as estimated, thirteen acres of the land embraced in Mrs. Rudisill's annuity mortgage. Record, pages 14 and 15; Dep. of Withers, page 242, Ques. 16.

Of these transactions between Freeman, Rudisill and the Barnetts, Bissell, the lender, had no knowledge, and he took no part in them. Dep. of Fisher; page 107 to 109.

Nov. 1, 1871, John H. Barnett made a will, which took effect by his death about Feby. 1, 1872. He left surviving his brother Abraham G. Barnett, and two sisters, Mary Wall and Susan B. Shoaff, both appellants here. By the will he gave his sister Mary Wall a life estate in that part of lot 106 belonging to him, and to Susan B. Shoaff a life estate in lot 105, being the same parcels previously mortgaged to Bissell. He gave his brother Abraham and his children the greater part of the homestead, a small portion being given to Mrs, Shoaff. The remainder after the life estate of Mrs. Wall and Mrs. Shoaff in lots 105 and 106, were to two children ot A. G. Barnett. The testator's interest in the paper mill "real and personal or otherwise," was given to A. G. Barnett and two sons of Mrs. Wall, —Charles W. and James B., with directions that the business should be carried on under the control of A. G. Barnett until James should reach the age of twenty-five. The part of the will most material here is the last clause, which is as follows:

"I name my brother, A. G. Barnett, executor, to act himself or jointly with some one he may choose; if acting alone then he shall and may do so without bond as such executor, but if acting with another, both shall give bond and take out letters testamentary and proceed according to law. But if he shall act alone, then as executor he shall have authority under this will to proceed as if he he had letters testamentary to execute the trusts devolved on him as executor; as also those which may incidentally arise in the execution of his trust as executor, but not any others arising out of a different relation, such as trustee or guardian of some of the parties named herein, or of some of the trust funds named hereinbefore. He shall have power to collect all debts, judgments or choses in action due me at the time of my death, all rents due me at my death of any and all my real estate except the homestead, and to have control of and dispose of all my personal property, moneys and effects, reducing them to availability, and to collect all rents on the lots devised, respectively located in the city of Fort Wayne, until such rents and a reasonable use of the homestead place including that devised to Mrs. Susan Shoaff and to himself until such funds so arising from rents, use of homestead, moneys, personal property &c., shall be enough to pay my debts, funeral expenses, debts of last illness and purchase a lot in Lindenwood Cemetery, properly and fairly improve it, pay for exhuming the remains of my father and mother, their interment, and the erection of a monument suitable to their condition in life, on said lot. And this shall be done as speedily as the nature of the business will allow; after which the devisees respectively herein lastly and antecedently referred to shall control said property as the same is intended in the respective clauses wherein said property is devised." Record, page 16.

After the death of John H. Barnett, Abraham G. Barnett, supposing in good faith that he was entitled so to do, took upon himself the administration of the estate, and without giving bond or taking out letters as executor, took possession of all the property, both real and personal, and settled the estate, with the exception of the debt to Bissell; all which was with the acquiescence of all parties—devisees, debtors, and creditors. Deps. of Freeman, page 114; Withers, page 115; Susan B. Shoaff, page 148; Mary Wall, page 154.

Jan. 23, 1875, Rudisill sold and conveyed to Burgess, Zollinger & Kamm part of the thirteen acres theretofore mortgaged to John H. Barnett for $10,000, which was paid in cash. Record, page 69.

On the same day, and to enable Rudisill to make said conveyance, A. G. Barnett entered upon the record of said mortgage to J. H. Barnett the following release of that part of the lands embraced in it sold to Burgess, Zollinger and & Kamm. Record, page 37.

" I hereby release from any and all lien by reason of
" this mortgage the following of the premises herein
" described: All that part of the S. E. ¼ of section 35
" twp 31 R 12 east, this day conveyed by the said

" Henry J. Rudisill to H. Burgess, Chas. A. Zollinger,
" & J. J. Kamm. Witness my hand as such executor
" Jan'y. 23, 1875.
" ABRAHAM G. BARNETT.
" *Executor of the Estate of John H. Barnett Deceased.*
" Attest: J. M. Koch. Rec. A. C.

On the same day Rudisill, in the place of the security thus released, executed to A. G. Barnett a mortgage securing the same five bonds named in the mortgage to J. H. Barnett, and covering eighteen acres of land on which were situated the mill and water power included in the annuity mortgage to Mrs. Rudisill. Of the lands thus mortgaged thirteen acres, including the dam, race and mill, were included in Mrs. Rudisill's mortgage. The remaining five acres were below the dam, and opposite the mill, and were unincumbered. Record, page 24.

At or about the same time Elizabeth Rudisill executed, a release upon the record of her annuity mortgage in these words; Record, page 190.

"I hereby release any and all liens by reason of this
" mortgage of the premises therein described, the follow-
" ing: viz; That part of the S. E. ¼ fr quarter of section
" 35 twp 31 R. 12 E. conveyed by Henry J. Rudisill to
" Messrs. Henry Burgess, Chas. A. Zollinger, Jno. J.
" Kamm by deed dated July 23, 1875. Witness my
" hand and seal this 23rd day of Jan. 1875."
"ELIZABETH RUDISILL."

This release was executed without any consideration to Mrs. Rudisill, and was intended to cover the lands solds to Burgess, Zollinger & Kamm, and to enable her son Henry to convey a good title to them. Dep. of Elizabeth Rudisill, page 222. It contains an error of description, which, it is claimed, makes it void as to

Bissell and the Barnetts. This circumstance is not material in the discussion of the main question raised by the appellants, and will be noticed only in the supplementary matter of this brief.

Immediately after their purchase Burgess, Zollinger & Kamm laid out the greater portion of the thirteen acres conveyed to them by Rudisill into city lots. Zollinger conveyed lots to Hoffmeister, McCurdy and Hattersley, and afterward all his remaining interest to Simons and Bass. Dep. of Zollinger, page 138. It is for these five grantees of Zollinger that this brief is filed. In this respect they all stand upon common ground with Burgess and the heirs of Kamm, for whom other counsel appears.

But Simons and Bass have also the following further interests in the case. After the commencement of the suit Mrs. Rudisill's annuity mortgage was assigned to them, and Henry J. Rudisill's legal title to the mill property came by mesne conveyances to one George Esmond, not a party here, for a consideration paid by them.

During the progress of the case it was shown to the court that the dam and mill were in danger of immediate destruction by flood. Geo. H. Wilson was appointed Receiver, and directed to make such repairs as were necessary for the safety of the property with money to be furnished by Simons and Bass as mortgagees, the same to stand as a lien upon that property alone. Record, page 51.

The amount expended for this purpose was $4,548.70 and in the final decree it was ordered that that sum should be paid out of the proceeds of the sale of the mill. Record, page 287.

On the map fronting page 92 of the record will be

found inclosed in the heavy red line the thirteen acres mortgaged by Rudisill to J. H. Barnett.

On the map fronting page 70 will be found inclosed in the heavy red line the land sold by Rudisill to Burgess, Zollinger & Kamm, except that the part marked "Hills Lot" ought not to be included.

On the map fronting page 249 all the various parcels are shown together. I have reproduced this map for this brief, and put upon it some additional colored lines showing distinctly each parcel as follows:

The red line incloses the thirteen acres mortgaged to J. H. Barnett.

The blue line incloses the land conveyed to Burgess, Zollinger & Kamm. From this the dotted blue line cuts off the part not embraced in the annuity mortgage.

The purple line encloses the lands mortgaged to A. G. Barnett in place of the lands released by him in favor of Burgess, Zollinger & Kamm. From this the dotted purple line cuts off the five acres not included in the annuity mortgage.

On pages 248 and 9 of the record the values of the several parcels in controversy are found by the special master to whom that subject was referred, and whose report was accepted without objection by all the parties. His summary is as follows:

Lot No. 1 on the map	$260.00
" " 2 " " "	1,768.00
" " 3 " " "	1,500.00
" " 4 " " "	1,500.00
" " 5 " " "	1,100.00
" " 6 " " "	305.00
Burgess, Zollinger & Kamm Addition	7,400.00
Portion of same south of red line separately	800.00

peared to be to the advantage of the Barnetts as well as Rudisill.

The pleadings in the record are exhaustive and exhausting. They include a bill or cross bill by every party to the case who had a shadow of right to ask for anything. I think they present, somewhere or somehow, every question that it is possible to argue in the case, and will authorize in some part, any decree which it is possible to make. Hence it seems to me unnecessary to notice them in detail.

The cause was submitted for interlocutory hearing upon a stipulation made by the parties that the court should at that time declare generally the rights of the parties, with leave to file further pleadings and take further proof afterward. Record, page 104. At this hearing the court found that the partial release of the Rudisill mortgage on the thirteen acres executed by A. G. Barnett was void, and that that mortgage was subject to foreclosure for payment of five of the plaintiff's bonds. Record, page 161 to 164.

Afterward further pleadings were filed, setting up the claims of the parties in this aspect of the matter, and in support of them further evidence was taken. At the final hearing the whole case came up for review, and the interlocutory decree was set aside, and a final decree rendered affirming the validity of the release executed by A. G. Barnett. That, of course, disposed of the cause without requiring at the hands of the court any consideration of the pleadings or evidence filed subsequently to the interlocutory decree. And if this court shall be of the opinion that the judgment of the Circuit Court was correct upon that point, the same result will follow here.

ARGUMENT.

The first and main question in the case is:—Was the partial release by A. G. Barnett of the mortgage given by H. J. Rudisill to J. H. Barnett a discharge of that lien in favor of those who purchased on the faith of it?

In doing what he did A. G. Barnett professed to act as "executor of the estate" of J. H. Barnett. But his description of himself is not very material. If he had a right, in any character or capacity to do the thing which he did, or if the purchasers had a right to rely upon his authority in any capacity to do the thing which he did, his act will be upheld. There are three characters in either of which he may be considered:—

As executor of the will of J. H. Barnett;
As trustee under the will of J. H. Barnett;
As the surviving joint creditor of H. J. Rudisill.

I will consider his power and his act in each of these aspects separately.

1. *A. G. Barnett as executor.*

The statute of Indiana requires an executor to give bond. And it is admitted that a testator can not abrogate the statute by directing that his executor shall not give bond. And so whenever any one interested in an estate raises the point against one assuming to act without bond, the court will order bond to be given. And to this class belong all the cases cited on this point in the brief of the learned counsel for the appellants.

In Landers vs. Stone, 45 Ind. 404, the deceased had disposed of part of his estate by will, and named Landers as executor, who qualified and gave bond in due form. Stone took out letters as administrator of that part of the estate not devised. The sole question in the case was as to the right of Landers to administer the whole estate as executor, including as well that of which the deceased died intestate as that devised by the will.

In *Jeffersonville R. R. Co. vs. Swayne's Adm.*, 26 Ind. 477, the sole question was whether an administrator could be appointed in Indiana upon the estate of an inhabitant of Pensylvania dying in Indiana, and leaving no assets in the state except an unliquidated claim for damages against a railroad company for causing his death. There was no will in the case.

In *Croston vs. Renner*, 103 Ind. 223 the question was whether after an estate had been finally settled, and the administrator discharged, an administrator *de bonis non* could be appointed while the order of final settlement remained unreversed. There was no will in the case.

These are all the Indiana decisions cited, and none of them appear to me to have any bearing on the matters here in issue. The other citations on this question in the brief for the appellants show on their faces that the questions decided in them arose in some sort of proceeding in which the right to act was directly questioned at the time. The naked references on page 26 of the appellants' brief will be found on examination to belong to the same class.

But the case in which the right of one to act is called in question directly and at the time is very different from the case in which the validity of an act long gone by, done in good faith with the acquiescence at the time of all concerned, is drawn in question against those who have expended money on the faith of it. And that is this case. There is no doubt that any one interested could have objected to any exercise of power *as executor* by A. G. Barnett without compliance with the law. But no one objected. And the question here is whether, notwithstanding every one concerned consented, the acts of the executor were nevertheless absolutely void.

The right to make a will was not conferred by the legislature of Indiana. Blackstone says: "With us " in England, this power of bequeathing is coeval with " the first rudiments of the law; for we have no traces " or memorials of any time when it did not exist." 2 Blackstone, 412. Various statutes were passed by Parliament, some limiting and some enlarging the power, until by the statute of 32 Hen. VIII, the whole subject was put in substantially the same form in which it remains to this day. This statute, and the whole common law on the subject, are made part of our law by adoption, except so far as displaced by express statute of our own. R. S. Ind., 1881, §236.

Mr. Williams thus defines the power of an executor at common law, and the effect of the will:

> "The probate is, however, merely operative as the *authenticated evidence, and not at all as the foundation*, of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the time of the testator's death. Hence the probate when produced is said to have relation to the time of the testator's death.
>
> Upon the principles stated in the preceding section it has been held that the executor, before he proves the will in a Spiritual Court may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus he may seize and take into his hands any of the testator's effects, and he may enter peaceably into the house of the heir for that purpose, and to take specialities and other security for the debts due to the deceased. He may pay or take releases of debts owing from the estate, and he may receive or release debts which are owing to it; and distrain for rent due to the testator. And if before probate the day occur for payment upon bond made by or to the testator, payment must be made to or by the executor, though the will be not proved, upon like penalty as if it were.

So he may sell, give away, or otherwise dispose at his discretion of the goods and chattels of the testator before probate; he may assent to or pay legacies; he may enter on the testator's terms for years; and he may gain a settlement by residing in the parish where the land lies. And although he should die, after any of these acts done, without proving the will, yet do these acts so done stand firm and good." Williams on Executors, 255.

Inasmuch, therefore, as the will itself rests on common law, and common right, and the executor's power flows from the will, the case is eminently fit for application of the distinction between mandatory and directory statutes. Whatever formalities are expressly made by the statute essential to the validity of a will, or the authority of an executor, must be so treated; but requirements not expressly made essential, ought to be treated as directory. The section of our statute relied on by the appellants in as follows: "No executor named in " the will shall interfere with the estate entrusted to " him, further than to preserve the same, until the issu- " ing of letters; but for that purpose, he may prosecute " any suit to prevent the loss of any part thereof."

It will be perceived that this statute does not assume to confer any power on an executor, or declare that an act done contrary to it shall be void; on the contrary, it assumes the *pre-existence of power by mere force of the will*, and *directs that its exercise* shall be preceded by the issuing of letters, except in the cases named. The exceptions stated, are themselves affirmations of the existence of power in the executor under the will without the authority of letters. He may do anything necessary to preserve the estate, even to the prosecution of a lawsuit, without bond, oath or letters—powers which may be very extensive, and which are not granted by the statute, but conceded, as powers created by the will. No such powers could be assumed by any one in a case of intestacy, or by any one not named as executor in a will. On its face therefore, the statute recognizes an executor as one deriving his power from the will, and as having some executorial power without bond, oath or letters; directing, however, that he shall not proceed beyond a given point without compliance with the formal requirements of the law in those particulars.

There is supposed to be some distinction between an officer *de jure* and an officer *de facto*. What is it? It is that the former is one vested with a perfect legal right; the latter, one acting under color of right, but without a perfect title. A. G. Barnett was apointed executor by the will, and under color of that appointment acted. Without the power conferred by the will he could not have been executor; with it he was executor, but as executor was directed by the law to take out letters testamentary before proceeding to the full exercise of his powers. It is impossible to conceive a case more suitable for the distinction referred to. Here was an office created by the will, an incumbent of it appointed, and an acceptance of it by him, followed by the exercise of its powers. Nothing was wanting to perfect his title except a formality reqired by the statute. To say that he was not an executor *de facto*, is to say that such an officer can not be, unless he is also an executor *de jure*.

This view of the standing of an executor, who is acting without letters or bond, is distinctly recognized in *Hays v. Vickery*, 41 Ind., 583. In that case one who was named as executor in a will, proceeded, by consent of the parties interested in the estate, to settle it up without taking out letters. Afterward, and while he was so proceeding, two of the heirs, being dissatisfied with his course, procured an administrator to be appointed, on the ground that the executor had renounced by failing to qualify within the time required by law.

But the appointment was set aside by the supreme court with directions to the court below to issue letters to the executor named in the will. It was held that he could not be regarded as having renounced. The decision assumes, necessarily, that the acts of the executor, though irregular, were not void.

I know of no case deciding in terms the precise question here presented. But analogous cases are numerous.

Thus, although the law directs that an administrator or guardian shall give bond, in terms as imperative as those used in the statute quoted, yet it is held in many cases that acts done in good faith without such bond are not void. *Dequindre v. Williams*, 31 Ind., 444; *Foster v. Birch*, 14 Ind., 445; *Ex parte Maxwell*, 1 Ala., 396; S. C. 37 Ala. 362; *Jones v. Gordon* 2 Jones Eq. (N. C.) 353; *Giddings v. Butler*, 47 Tex. 535.

Suppose a person duly elected to the office of sheriff, should assume and exercise its duties, without receiving a commission, taking oath, or giving bond, but with the acquiescence of the courts and the public; would all his acts be void, his execution sales nullities, his custody of prisoners false imprisonment, his hanging of a murderer a murder? Precisely the contrary is decided. *The People v. Hopson*, 1 Denio, 574; *The People v. Stevens*, 5 Hill 630, *Bucknam vs. Ruggles*, 15 Mass., 180; *McInstry v. Tanner*, 9 *Johns.*, 135; *Doty v. Gorham* 5 Pick 487.

2. *A. G. Barnett as trustee.*

A. G. Barnett was not only named as executor of the will of J. H. Barnett, but he was by the will made the trustee of trusts comprehending the entire estate, real and personal, and vested with a breadth of discretion in the execution of them, which made it impossible for a stranger to know how much might be embraced in them, or how long they might continue.

There is a clear and well established distinction between testamentary powers, which are purely executorial, and those which are not. The proper functions of the executor are ended, when the personalty has been converted into money, and the debts paid. If powers are conferred upon an executor, extending beyond the settlement of the estate, he takes them, not as executor, in strict sense, but as trustee, or donee of a power. And as such trustee, one may act without oath, letters or bond. In determining the character, in this respect, of the trusts created by a will, reference is had, not so much to the precise words used, as to the nature of the powers conferred. One person alone may be named and he may be named as executor, and not otherwise; and yet, if some of the powers conferred on him relate to the settlement of the estate, and others to matters clearly additional to such settlement, he will take the former powers as executor, and the latter as trustee, simply.

There is a case of great magnitude, now pending on the docket of the court in which this case was tried below,—that of *Halliday v. Ewing*, which furnishes at once an illustration and, I may say, an authority on this point. By the will of George W. Ewing, who died at Fort Wayne some years since, two persons were appointed executors, and as such, empowered in the usual phrase to settle up the estate. In addition to that they were directed to make costly improvements on certain lots designated, to sell other land, to collect rents, and retain control of the bulk of the estate for the benefit of the children of the testator, until the death of the last survivor of them. All this they were directed to do *as executors*, no other term being employed in the will. They received letters testamentary from the

Court of Common Pleas of Allen County, administered the estate, paid the debts, and so far, made final report to that court. One of the executors having resigned, a bill was filed in the United States Circuit Court for the District of Indiana, praying for a construction of the will, and a definition of the powers of the remaining executor. It was decreed that the functions of the executors as such, and as trustees, were distinct and separable; that the settlement of the estate terminated their duties as executors, that the remaining executor held the estate, not as executor, but as trustee simply, and that he should make no further reports to the court of probate jurisdiction in Allen county, but submit him self, as trustee, to the jurisdiction of that court.

The same distinction is taken in many reported cases. In *Conklin v. Egerton*, 21 Wend., 430, the question was, whether a power granted to an executor by will to sell real estate, could be executed by an administrator with the will annexed. In the course of the decision the powers and duties of executors were critically discussed, and the distinction between an executor and a trustee clearly drawn. The court say—

Cowen, J. "It appears to me that this novel effort to vest in an administrator the power of selling the real estate of a devisor, has arisen from confounding the legal office of an *executor*, with that of one who is not so in any sense of the word, but who is the *mere donee of a trust* power; an authority which, so far from having any reference to the office of executor, might just as well have been conferred by the will on any other person not named as executor, and one who might have executed the power without probate or letters testamentary * * To make an executor, the will must appoint him such *eo nomine*. Even a trustee of the testator's personal estate, named and appointed as such by the will, is not an executor. When a man was appointed by the testator *trustee of his last will and testa-*

ment, and was committed by the ecclesiastical judge for not exhibiting an inventory and account, the king's bench discharged him on *habeas corpus*, saying that, in this character, the judge had no jurisdiction over his person. *The King v. Jenkins*, 1 Dowl. & Ryl., 41.

The devisor may require some future act to be done, in order to the vesting of an estate; and may, and often does, delegate the power to some friend who is to designate the devisee, and make a sale or distribution of land, already devised in fee. But in this, his friend does not act as executor; the law does not consider him as such. His powers are regulated by distinct departments of the statute or common law, those relating to powers in trust, the due execution of which are supervised, not by the ecclesiastical tribunal, or the surrogate's court, but by the courts of chancery and common law."

In *Dunning v. Ocean National Bank* 61 N. Y., 497, the action was by one claiming as testamentary trustee, to recover surplus money arising upon a foreclosure sale. By the terms of the will, a farm was devised to the executor in trust; the executor renounced all his "right and claim to act as executor of the said estate." Dunning, the plaintiff in the cause, was then appointed administratrix with the will annexed. Ten years afterward the same person was appointed by a court of chancery trustee of the trust created by the will, and as such trustee, brought the action. The statute of limitations was relied on as a defense. The facts were such that if the right of action was in the administratrix, then the action was barred; if not, not. The court say—

Reynolds, C. "It is said in the old books, and the rule is still to a large extent preserved, that an executor merely takes by force of the probate of the will, and that the legal office of the executor does not necessarily embrace naked powers respecting real estate, specially conferred, or powers coupled with an interest or trust of any kind; and it is not too much to say that the appointment of a trustee, named in a will, of all the personal estate of a testator, would not have made him executor at the common law. The distinction between the mere executorial powers, derived from the probate of a will, and powers given to a person named executor, in respect to real estate, either naked or in trust, with an interest, has not, I think, always been very carefully considered, so far as the adjudged cases enable me to discover. In the case at bar, it is, I think, very obvious, that the testatrix intended to make her executor a trustee, with large discretionary power, *which he might exercise without any reference to his duty as an executor.* This trust duty was not annexed to the office of executor, but was devised to him as a *person. He might, therefore, accept and execute the trust without proving the will or taking out letters testamentary.* He became trustee, and was vested with the trust estate by virtue of the will alone."

In *Bolton v. Jacks*, 6 Rob., N. Y., 166 a question arose as to the validity of a sale made by an executor. The estate sold was devised by the will to the executor, by that name merely, in trust for the testator's wife and children. It was held by the court that the probate of the will, and the letters issued, were void, and that the deed of the executor must stand as though he had made it without probate or letters. On that point the court, on page 228, say—

"Was it necessary that the will should be proved, and letters testamentary issued, before Burrows could execute the power of sale? I think not. He took as the donee of a power in his individual capacity, and not in his capacity as executor. The proceeds of the sale were not to be applied by Burrows in the course of his duties as executor. On the contrary, they were to be applied for the benefit of the testator's wife and children, according to the provisions of the will. The effect of the clause containing the 'power to sell, invest, re-invest, for the benefit of the wife and children as aforesaid,' taken in connection with the previous provisions of the will, requiring the executor to pay the interest, income, rents and proceeds of his property to such wife and children, in the manner directed, is to create a trust for those objects, and place the property in the hands ot the person named executor, as trustee to carry out the trusts, giving said trustee a power of sale. Under such circumstances, the person named as executor, takes, not as executor, but as the donee of a power, in his character as trustee, and his right to sell is derived from the will, and not from the probate thereof, or the letters testamentary."

Although this decision was not that of a court of last resort, yet the character of the case, and the counsel engaged, the fullness of the argument and opinion, and the fact that no appeal appears to have been taken, all together, invest it with a degree of authority wanting in the decisions of many tribunals of final jurisdiction.

In *Tainter v. Clark*, 13 Met., 220, a testator had authorized his executor to sell so much of his real estate as he should judge best, to raise $2000 for the use of his wife and daughter, and to pay his debts. The executor named declined to act as such. An administrator with the will annexed was appointed, who, assuming that he possessed all the powers granted to the executor, sold lands of the testator. The validity of the sale was the question to be tried. It was held that the sale was void. The court say, on page 226—

WILDE, J. "There is another ground on which we hold, very clearly, that the power to sell has not been transmitted to the administrator, if by law it could be. Tucker, the donee of the power, has never renounced it, and the consequent trust; and we are not aware of any impediment to his executing it. He has, it is true, declined the office of executor, but the power of selling real estate is no part of the business of an executor or administrator, unless he obtains license under the statute; he has no interest in the land, and no authority to sell it, except the authority which may be derived from the statute. The executor, in this case, was the donee of a trust power, which was distinct from the office of executor, and the trust might exist for years after the duties of the office of executor had been fully performed. This trust power has never been renounced, and consequently has not been transmitted to the administrator."

To the same effect see *Beekman v. Bonsor*, 23 N. Y. 298; *Cole v. Wade*, 16 Ves. jr., 27; *Sheets Estate*, 52 Pa. St., 257; I V. & B. 213; 3 Ves. jr., 210; *Cockrill v. Armstrong*, 31 Ark., 580.

Applying these principles to the present case, it will be seen that the will of John H. Barnett vested in Abraham G. Barnett extensive trusts, entirely unconnected with his duties as executor. He was to continue the business of the partnership in the paper mill, according to the terms of some contract hinted at, but not stated in the will, and known only to himself; he was to control the real estate, collect rents, reduce the personal assets to cash; and, after payment of debts, buy a lot in the cemetery, improve it, remove the remains of his parents to it, and erect above them a monument. In all this he was to proceed according to his own discretion.

These trusts comprehended the entire estate, and were such as might have to continue many years. A stranger, finding him in possession of the estate, had a right to refer his possession to his authority as trustee, and deal with him accordingly.

It is true that in the proper order of things, the executorial trusts which devolved on him under the will, would take precedence in time. It would be his duty, first, to settle the estate as executor; and then as trustee, to take possession and control of the property remaining, and perform his duties in that capacity.

But suppose he failed to qualify as executor, would that disqualify him as trustee? There being no executor, would not his possession and control of the assets as trustee be lawful? It may be admitted that any debtor, creditor, or distributee of the estate, might have objected, and insisted that there should be a complete and formal administration of the estate, before the assets should pass into the hands of the trustee. But as no one did object, was not the possession and control of the trustee lawful, and authorized by the will?

There might be a case in which there would be a large estate, and yet nothing for an executor to do. A man might pay all his debts, including his funeral expenses, in his lifetime, and leave his whole estate to a trustee. Would it be necessary to go through with a barren form of administration, in order to get the estate into the hands of the trustee? Such a position will hardly be taken. If not, it necessarily follows that strangers, who found A. G. Barnett in full possession of the estate, dealing with it in a manner within the scope of his authority as trustee under the will, and who invested their money on the faith of his acts, will be protected by this court, notwithstanding he may have been without authority as executor.

3. *A. G. Barnett as surviving joint creditor of H. J. Rudisill.*

J. H. and A. G. Barnett upon their joint bonds borrowed $8000 from Bissell. It was all put into the paper mill business, and $5000 of it to the credit of Freeman. For this sum Rudisill gave his bond first, and afterward his mortgage. The result of this was to make J. H. and A. G. Barnett the *joint creditors* of Freeman as principal debtor, and of Rudisill as his surety, in the sum of $5000. This court will not be blinded by the form of the transaction. The eyesight of equity is too keen to be deceived by external disguises, He who advances his money is the creditor; he for whose beneficial use it is advanced is the debtor. Bissell advanced his money to J. H. and A. G. Barnett, and to no one else, and for no one else, so far as he was concerned. They advanced $5000 of their money to Freeman on the faith of Rudisill's bond. They were, therefore, joint debtors of Bissell, and joint creditors of Freeman and Rudisill. To the relationship thus created all the rights and liabilities of joint debtors and creditors attached at once, embracing the right of contribution, the right of each to receive from the common debtor the money due both, and the right of survivorship. When J. H. Barnett died, the right to receive the money from Freeman or Rudisill vested in A. G. Barnett as survivor, as absolutely as though he had been the sole borrower from Bissell & Co., and the sole lender to Freeman.

Upon the proposition here involved there is abundant authority. In the case of the *People vs. Keyser*, 28 N, Y., 226, the question is discussed quite as fully as in any case that I have observed. In that case a mortgage was made to "S. M. and J. W., executors of the estate of J. E." S. M., one of the motgagees died, and the money was paid to the survivor, J. W., who executed a satisfaction piece of the mortgage, which the register refused to record, because the executors of S. M. had not joined in it. The mortgagor moved for a writ of mandamus against the register, commanding him to satisfy the mortgage of record. The writ was granted. The court say—

Balcom, J. "The Supreme Court of Pennsylvania held in *Penn vs. Butler*, 4 Dallas, 354, where two tenants sold real estate which belonged to them as tenants in common, and took bonds and mortgages in their joint names for the purchase money, that the surviving obligee and mortgagee 'was entitled to the possession 'of the joint securities, and that he might recover the 'amount.' The same court held in *Bowers vs. Seeger*, 8 W. & S., 222, where a mortgage was assigned to two persons, that payment of it to one of such persons discharged the debt, and that the receipt of the one to whom the payment was made was evidence to show that the debt was discharged.

Kent, Ch. J., in delivering the opinion of the court in *Pierson vs. Hooker*, 3 Johns, 68, said—'It is a general 'principle of law, that where two have a joint personal 'interest, the release of one bars the other, (Ruddock's 'case 6 Co., 25) and I can not perceive that the case of 'co-partners in trade forms an exception to the general 'rule.' The court held in that case, that the release of a debt due a partnership by one of several partners, by a writing under his hand and seal in the name of the partnership, was binding on all the partners.

It was held in *Austin vs. Hall*, 13 Johns, 286, that in an action by tenants in common, for a trespass on land of which they were co-heirs, a release by one of the plaintiffs was a bar to the action.

Fitch & Buck vs. Forman, 14 Johns, 172, was an action on a covenant, by which the defendant bound himself to do a certain act by a certain day. Buck afterwards, by a writing under seal, endorsed upon the original agreement, released the defendant from a performance within the time mentioned in the agreement. Thompson, Ch. J., in delivering the opinion of the court, said: 'They (the plaintiffs) had a joint personal interest, and 'the release, or modification by one would bind the 'other.'

Judge Cowen laid down the rule in his treatise, (2 Cow. Tr. 2d ed. 772) that 'A release by one of several 'persons, having a joint demand, is valid against all, 'even though such demand be the proper subject of 'trespass, or case, or for a wrong.'

"The principle on which these cases are determined, authorized either Maycock or Wright to receive the money for which the mortgage was given, and to satisfy the same, though it was their private property, and held by them as tenants in common; and upon the same principle, Wright, as surviving mortgagee after the death of Maycock, could lawfully receive the money mentioned in the mortgage, and execute a certificate satisfying the mortgage which would authorize the register to discharge the same on the record."

"The right to the money, secured by the mortgage, being personal, a mere chose, or thing in action, either mortgagee could receive the same, and discharge the right to recover it of the mortgagor." * * *

"It seems to me there can be no doubt that the payment of the mortgage to the surviving mortgagee discharged the mortgage, so that no action could be maintained on it by the representatives of the deceased mortgagee, or by them and the survivor, or by either."

SELDEN, J. "If the relator's mortgage furnished evidence upon its face that it belonged to the mortgagees as executors of the will of Mr. Espie, then the certificate of Wright, one of the executors, duly acknowledged, showing that it was paid, entitled the relator to have it discharged upon the record. Dnring the lives of both executors, either one had power to discharge a mortgage belonging to them as executors; and on the death of one, all the rights and powers of both vested in the survivor." * * *

"If, however, a different interpretation be given to the language of the mortgage, and it is held by its terms to have belonged to Maycock and Wright in their private character, and not as executors, the certificate and acknowledgement of Wright would be equally effectual for its discharge. Any one of several joint payees of a note, bond, or other personal obligation, has a right to receive payment of, and to discharge such obligation."

I have quoted largely from this case because it presents in the form of authority the exact argument which I wish to offer. The case of *Austin vs. Hall*, cited above, is reported in 7 Am. Dec., 376, with a note commenting on it as follows:

> "This case is considered as authority upon the point that a release by one of two or more having a joint personal interest will be binding on the others, and is followed in *Decker v. Lingston*, 15 Johns, 432; *Wheeler v. Curtis*, 11 Wend, 663; *Bradley v. Boynton*, 22 Maine, 290; *Hall v. Gray*, 54 id. 231; *Wishart v. Legro*, 33 N. H. 182; *True v. Huntoon*, 54 id. 121; *Grossman v. Lauber*, 29 Ind., 622; *Smith v. Wiley*, 22 Al., 403; *Stapleton v. King*, 33 Iowa, 35."

To the same point are *Myrick v. Dame*, 9 Cush. 248; *Blake v. Sanborn*, 8 Gray, 154; *Martin v. McReynolds*, 6 Mich. 70; *Emerson v. Kenower*, 8 Pick. 63.

4. *Ratification by all parties concerned.*

By the will of J. H. Barnett, the rents of the real estate are charged with the payment of the debts. They were amply sufficient for that purpose. The persons first interested in the rents were Mrs. Wall, devisee for life of that part of lot 106 covered by the mortgage to Bissell, Mrs. Shoaff, devisee for life of lot 105 also embraced in the mortgage to Bissell, and A. G. Barnett, devisee in common with his children, with right of control of the homestead. The minor children who took in remainder could not ratify or be estopped. But Mrs. Wall and Mrs. Shoaff were competent to appoint agents to manage business for them, and to ratify acts done for them by an agent. After the death of J. H. Barnett, they permitted A. G. Barnett to take possession of the entire estate, and manage and control it, exercising all the powers which could be exercised by executor, trustee, or agent. It was in the course of this business that he executed the partial release of the

Rudisill mortgage. It is wholly immaterial whether he was acting as executor, trustee, or surviving joint creditor. The things he did were all acquiesced in by all parties until long after the release in dispute had been entered, and now no one questions any of his acts but that one. It was but one of a series of acts, numerous and important, and extending through several years in time, all done under the same color of authority, and for a common purpose. Can the devisees, after accepting and ratifying the whole series, single out this one to be disaffirmed on the ground of general want of authority after others have acted on the faith of it?

The sale to Burgess, Zollinger & Kamm was a notorious affair. They laid off the land conveyed to them into city lots, recorded the plat, and sold a number of lots. The mortgage given to A. G. Barnett, was not additional to the first mortgage, but in the place of it, to the extent of the land conveyed to Burgess, Zollinger & Kamm. The act of A. G. Barnett in accepting it, has never been disavowed by the plaintiff, or the devisees of J. H. Barnett. On the contrary they have treated it as a valid security, and are seeking to enforce it in this very suit. Such a ratification covers the whole ground. A party thus situated can not claim both securities, and the least act of adoption of one, operates as a final relinquishment of the other. *Farmer's Loan & Trust Co. v. Walworth*, 1 Comst, 433.

The only point raised by the exceptions of the appellants or discussed in the brief of counsel is that the Circuit Court erred in holding that the partial release by A. G. Barnett of the mortgage to J. H. Barnett was a discharge of that mortgage *pro tanto* as to the purchasers. And it may be that, strictly speaking, there is no other question before the court to be discussed. Certainly, if this court shall affirm the decision below on that point there is no other question to be considered. But while I feel bound to anticipate that result with the greatest confidence, there is the always existing possibility that the event may be otherwise. In that case a totally new aspect of affairs will be presented, and one which will require consideration of the pleadings and evidence filed after the interlocutory decree, and the settlement by the court of some disputed questions. In such situations I suppose that this court will not undertake to frame a decree *in extenso*, but will remand the cause to the Circuit Court for that purpose, with such general directions as may be deemed necessary as to the principles to be observed. With this view I present below some observations which may be called supplementary, as applicable to the case in such a contingency. If the contingency shall not arise there will be no occasion to read or consider them.

SUPPLEMENTARY.

The pleadings in the case set up four separate liens for adjudication, and there are six different parcels of land variously affected by them. If the release executed by A. G. Barnett is to be set aside, and the mortgage given to J. H. Barnett restored to its former standing it will follow:—

1. That the release executed by Mrs. Rudisill must be set aside also, and her annuity mortgage restored to its former *status*.

2. That the substituted mortgage given by Rudisill to A. G. Barnett shall be cancelled.

The sale to Burgess, Zollinger & Kamm, the releases by A. G. Barnett, Mrs. Rudisill, and the mortgage to A. G. Barnett on the mill, were all parts of one transaction. Each was in consideration of all the others, and no one of them would have taken place if any one of the others had not taken place. If any part of the transaction is to be undone, it must be undone in every part, or injustice will result.

Mrs. Rudisill released her mortgage to enable her son to make a good title to the purchasers. For that act on her part, the money paid by them was a good and sufficient consideration. But the Barnetts paid no part of that consideration. They did give a consideration in the execution of the partial release. But if they take that back, they stand as having given none. And it is not to be supposed that a court of equity will set aside that release at their request without requiring them to give up all they got for it, which includes Mrs. Rudisill's release of the annuity mortgage, and the mortgage to A. G. Barnett on the mill.

If there were any doubt on this point as a question of equity and good concience merely, it would be settled by the circumstance that Mrs. Rudisill's release is on its face, void and of no effect. By reference to page 5 of this brief, where the release is set out *verbatim*, it will be seen that the land released is described as that conveyed to Burgess, Zollinger & Kamm "by deed dated July 23, 1875." It is proved that no deed of that date was ever executed between these parties. Dep. of Zollinger, page 243. There is no doubt that this release was intended to refer to the deed executed January 23, 1875, and in any case in which the court would be at liberty to amend the writing to conform to the intention of the parties it would be proper to read it "Jan. 23," instead of "July 23." But as it stands, the release means nothing. The identification of the deed is an indispensable part of the description of the land released. And if no such deed as that named was ever executed, no land is described. In favor of one who paid a consideration for the release, (as the purchasers did,) it would be the duty of the court to correct it. But one who paid nothing has no such right. And in this situation are the Barnetts the moment their release is set aside and their first mortgage re-instated. All this seems too plain to require further argument.

The cancellation of the mortgage on the mill executed by Rudisill to A. G. Barnett, follows on grounds equally plain. It was given to take the place of the security released; if that release was void it was without consideration.

If the case shall come to the complexion I am now supposing, other questions will arise as to the marshalling of the assets for sale, which I shall not discuss, assuming that in the very improbable contingency of their presentation they will be referred to the court below for settlement.

R. S. TAYLOR.